No. 9474

United States

Circuit Court of Appeals

For the Ninth Circuit.

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SOUTHERN PACIFIC COMPANY,
a corporation,

Appellant,

vs.

JOE CONWAY,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Arizona.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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In the District Court of the United States
in and for the District of Arizona

No. Civ. 31-Phx.

SOUTHERN PACIFIC COMPANY,
a corporation,

Plaintiff,

vs.

JOE CONWAY,

Defendant.

COMPLAINT FOR DECLARATORY RELIEF

To the Honorable, the District Court of the United States, in and for the District of Arizona:

Southern Pacific Company, a corporation, presents this, its verified Complaint for Declaratory Relief, against the defendant, Joe Conway, and for cause of action complains and alleges as follows:

I.
Status of the Parties

(a) Plaintiff now is, and at all times herein mentioned has been, a corporation duly organized and existing under and by virtue of laws of the State of Kentucky, and a citizen and resident of that State. Plaintiff now is, and at all times herein mentioned [4] has been, engaged in the operation, as a common carrier in interstate commerce, of lines of railroad, situated in the States of Oregon, California, Nevada, Utah, Arizona, Texas and New Mexico, and in the transportation of passengers and property from, to, and between points in each and all

of said states. At all times herein mentioned plaintiff, as such interstate common carrier by railroad, has been and now is subject to the provisions of the Act of Congress approved February 4, 1887, and acts amendatory thereof and supplementary thereto, known as the Interstate Commerce Act.

(b) Defendant, Joe Conway, is sued herein as an individual, and not in his official capacity. Said defendant is a citizen of the State of Arizona, residing in the City of Phoenix, County of Maricopa, in said state, and is the duly elected, qualified and acting Attorney General of the State of Arizona. As such, under the Constitution and laws of that state, there is vested in him the exclusive power, and upon him is imposed the mandatory duty, to commence and prosecute and to direct the institution and prosecution of, suits for penalties for every violation of the Arizona Train-Limit Law, the statute the validity of which constitutes the subject-matter of the instant controversy.

II.

Jurisdiction.

The grounds upon which the jurisdiction of this Court depends are as follows:

(a) This is a civil suit, in the nature of a suit in equity, between citizens of different states, whereof the District Court of the United States for the District of Arizona has original jurisdiction, and is a suit for a declaratory judgment and decree, pursuant to the provisions of the Federal

Declaratory Judgment Act of 1934 (28 U. S. Code, Section 400), and presents an actual [5] controversy between the plaintiff and the defendant as more fully appears hereafter, which may be finally adjudicated and determined as between said parties;

(b) The matter in controversy greatly exceeds, exclusive of interest and costs, the sum or value of Three Thousand (3,000) Dollars; and the value of the right of the plaintiff herein sought to be declared, preserved and maintained, to wit, the right of the plaintiff to operate within, as well as into and out of, the State of Arizona, interstate trains consisting of more than 70 freight or other cars, exclusive of caboose, and interstate passenger trains consisting of more than 14 cars, greatly exceeds the sum of Three Thousand (3,000) Dollars.

(c) This suit arises under the Constitution and laws of the United States, in that plaintiff seeks herein, pursuant to subsections 1 and 14 of Section 41 and Section 400, of Title 28 of the United States Code, to obtain the final judgment and decree of this Court, adjudging and declaring that that certain statute of the State of Arizona hereinafter set forth, known as the Arizona Train-Limit Law, which statute prohibits, under severe penalties, the operation in said state of railroad trains containing more than 70 freight or other cars, exclusive of caboose, and of passenger trains containing more than 14 cars, is void, invalid and unenforceable, because repugnant to and in conflict with the Due-Process Clause of

the Fourteenth Amendment to, and the Commerce Clause of, the Constitution of the United States, and the Interstate Commerce Act and related acts of Congress hereinafter more specifically referred to;

(d) The damage and injury which plaintiff daily and proximately sustains and will continue to sustain by reason of said statute are and will be *of* great and irreparable; but by reason of the provisions thereof, plaintiff cannot safely disregard the same and await prosecutions thereunder for the purpose of [6] testing the validity thereof, and is wholly unwilling to do so, because of the enormous penalties that would shortly accrue if such a course were followed and said law sustained; and also by reason of the narrow scope of the evidence, in criminal proceedings, and the multiplicity of suits, and the procedural difficulties which would be encountered, in suits at law.

(e) In addition to the foregoing general statement, the facts, circumstances and conditions hereinafter set forth in this complaint for declaratory relief justify and necessitate the exercise of the jurisdiction of this Court to afford unto plaintiff the declaratory relief herein prayed for, and such other relief as may be meet in the premises.

Wherefore, this Court is now vested with appropriate jurisdiction and power to declare the rights, duties, powers, obligations and legal relations of the parties interested herein as the same may be affected by said Arizona Train-Limit Law; and said parties are entitled to such declaration, the same to have

the force and effect of a final judgment and decree and to be reviewable as such.

III.

Description of Plaintiff's Lines of Railroad.

Plaintiff's main lines extend from San Francisco, California, to Portland, Oregon, and across the State of Nevada to Ogden, Utah; and extend also from San Francisco, southeasterly to Los Angeles, California, and thence to Yuma, Arizona, and thence across the southern part of the States of Arizona and New Mexico, via El Paso, Texas, to Tucumcari, New Mexico. At each of said points other than Yuma, as well as at numerous other points, plaintiff's lines connect with the lines of other interstate rail carriers, and thus enter into and become part of through routes for the transportation of freight and passengers between all parts of the United States, and to and from adjacent [7] foreign countries.

The major portion of the interstate freight traffic transported by plaintiff across or partly in Arizona over its southern Arizona route is handled by way of the main line which extends through Indio, California, Yuma, Maricopa and Tucson, Arizona, and Lordsburg, New Mexico, to El Paso, Texas. Plaintiff also has an alternate main line, which departs from the Yuma-Maricopa-Lordsburg line just described at Wellton, Arizona, and runs thence northeasterly to Phoenix, Arizona, and thence southeasterly to Picacho, Arizona, where it joins the Yuma-

Maricopa-Lordsburg line. A second alternate main line of the plaintiff leaves the Yuma-Maricopa-Lordsburg line at Mescal, Arizona (about 30 miles easterly from Tucson) running thence via Douglas, Arizona, to El Paso, Texas. The three lines of the plaintiff just described, considered together, afford to it practically two lines for the entire distance from Yuma to El Paso; but, except for short stretches of double-track near Yuma, Phoenix, and El Paso, and a double-track district about 43 miles in length between Stockham and Mescal, Arizona, these lines are operated as single-track lines.

Passenger traffic which originates in or crosses Arizona uses all these lines; but because the route between Yuma and Tucson via Phoenix is somewhat longer than via Maricopa, through interstate freight trains between Yuma and Tucson are generally routed via Maricopa. Between Tucson and El Paso, about 65 per cent of the through interstate freight traffic is moved via Lordsburg, and about 35 per cent via Douglas.

Plaintiff's main lines cross southern Arizona and New Mexico on comparatively light grades and through much level territory. They are well constructed, according to the best modern railroad standards, and capable of sustaining the heaviest and most powerful locomotives owned or operated by plaintiff. They are [8] equipped throughout with automatic block signals, and numerous other devices promoting safety of operation. The operating conditions upon said main lines generally are

relatively favorable to speed, safety, and economy of operation.

The operating conditions upon plaintiff's main lines across Nevada and Utah are closely similar to those upon the main lines across Arizona and New Mexico. Said lines in Nevada and Utah are well constructed, according to the best modern railroad standards, and are equipped throughout with automatic block signals and numerous other devices promoting safety of operation.

IV.

History and Text of the Act Complained Of.

On May 16, 1912, the Governor of the State of Arizona approved an act of the Legislature of that State entitled "An Act limiting the number of cars in a train", which act was afterwards, on referendum at a general State election held November 5, 1912, approved by a majority of the voters of said State voting at said election (Laws, 1913, Referendum, p. 15; Sections 2166-2168, Revised Statutes of Arizona, 1913; Civil Code of Arizona, Section 647, Arizona Revised Statutes, 1928), and ever since has been and now is in full force and effect. Said act has no preamble, and reads as follows:

> "Section 1. It shall be unlawful for any person, firm, association, company or corporation, operating any railroad in the state of Arizona, to run, or permit to be run, over his, their, or its line of road, or any portion thereof, any train consisting of more than seventy freight, or other cars, exclusive of caboose.

"Section 2. It shall be unlawful for any person, firm, association, company or corporation, operating any railroad in the state of Arizona, to run, or permit to be run, over his, [9] their, or its line of road, or any portion thereof, any passenger train consisting of more than fourteen cars.

"Section 3. Any person, firm, association, company or corporation, operating any railroad in the state of Arizona, who shall wilfully violate any of the provisions of this act, shall be liable to the state of Arizona for a penalty of not less than one hundred dollars, nor more than one thousand dollars, for each offense; and such penalty shall be recovered, and suits therefore brought by the attorney general, or under his direction, in the name of the state of Arizona, in any county through which such railroad may be run or operated, provided, however, that this act shall not apply in cases of engine failures between terminals.

"Section 4. All acts and parts of acts in conflict with the provisions of this act are hereby repealed."

V.

Effect of the Law Upon Plaintiff's Freight-Train Operations.

(a) Railroad operating conditions, both on plaintiff's lines in Arizona, and elsewhere, and on railroads throughout the United States generally, differ substantially from the operating conditions which existed in 1912, when the Arizona Train-

Limit Law was passed, in that since 1912, and more especially since 1920, great improvements have been made in both road and equipment. Tracks, roadbeds, and bridges have been made stronger; grades and curves have been reduced or eliminated; side tracks and passing tracks have been lengthened; block signals and other safety devices have been installed; safer and more powerful locomotives, and stronger freight and passenger cars have been built and acquired. The greater part of these improvements has taken place since 1920, and has been accomplished by the ex- [10] penditure of large sums of money, which expenditures in many instances have been sanctioned by the Interstate Commerce Commission, under Section 20a of the Interstate Commerce Act. This is particularly true with respect to the acquisition of large and powerful locomotives designed and used for the handling of trains consisting of more than 70 freight cars, or more than fourteen passenger cars. These and other expenditures have been made largely for the purpose of increasing the lengths and the loading of trains, and promoting the safety of handling thereof, so as to bring about and maintain safer and more efficient and economical operations.

(b) The locomotives and cars now used on plaintiff's main lines in Arizona, and elsewhere, have been greatly and continually improved since 1912, and have thus been made stronger and better able to withstand the most arduous and serious conditions. The standard locomotives generally used by

plaintiff at the present time have been and are built with heavier frames and running gears, improved and strengthened brake equipment, draft gears and attachments, and air pumps of increased capacity. The boilers also have been much improved; and many if not all of such locomotives are equipped with feed-water heaters, super-heaters, and other modern devices designed to promote safety, efficiency and economy in operation.

The freight and passenger cars used in plaintiff's trains in the State of Arizona have likewise been greatly improved since 1912, and particularly since 1920. In 1912 about 40 per cent of the freight cars of the plaintiff were equipped with wooden underframes; that type of car has now been entirely withdrawn from main-line and interchange service, and all freight cars now used in such service are equipped with steel underframes. Modern draft gears and modern standard single-plate cast-iron wheels have been installed upon plaintiff's freight equipment. [11] Improvements have been made in the air-brake triple-valves in such freight cars, the result of which is practically to eliminate unintended emergency-brake applications.

(c) Since 1920 plaintiff has spent approximately $9,000,000.00 in Arizona, primarily for the purpose of improving its tracks, track facilities and terminals, and in installing block signals and other safety devices. Plaintiff has also invested about $13,000,000.00 further in Arizona, since 1920, in the rehabilitation, construction, and reconstruction of

the alternate main line from Wellton through Phoenix to Picacho, heretofore described. The track, roadbed, and bridges on the plaintiff's main lines in Arizona and elsewhere are capable of carrying the heaviest locomotives owned by said plaintiff; and there is no reason, from the standpoint of climatic conditions, or track, grades, or curvatures, or the strength or capacity of road and equipment now owned and available, why the plaintiff could not at once commence the operation, on its main lines in Arizona and in the adjacent states of California and New Mexico, where the Arizona Train-Limit Law operates to restrict the length of trains, of a very substantial number of freight-train units of substantially more than 70 freight or other cars, and passenger train-units of substantially more than 14 passenger-cars, and thus operate its lines of railroad in said territory more safely, efficiently, and economically, and in line with the best modern railroad practices, and thereby secure the benefits of immediate, substantial, and much-needed operating economies.

(d) Prior to 1912, freight trains containing more than 70 cars were operated mostly on favorable grades, or consisted in whole or in large part of empty cars. Principally by reason of improvements in roadbed, equipment, and operating methods, made since that time, heretofore described in part, the operation of through trains containing more than 70 freight or other [12] cars,

either loaded or empty cars or both, on main trunk lines, including those of plaintiff, has become and ever since about the year 1924 has been, and now is, the common standard railroad practice throughout the United States, except in Arizona, and the adjacent portions of California and New Mexico where the Arizona Law operates with extraterritorial effect; and the maximum lengths of such freight trains, outside of Arizona, are very much greater than those permitted in said state.

Except in Arizona and adjacent territories affected by said Train-Limit Law, freight is now transported between all parts of the United States, in trains of more than 70 cars, upon dependable schedules; and such schedules are one-half to one-third faster than prevailed prior to 1924. Such common standard operation of freight trains of more than 70 cars, upon such faster schedules, has made possible the nationwide distribution and consumption of the perishable and other products (including livestock) of California and Arizona, as well as other states and localities, and moving in interstate and foreign commerce over the lines of plaintiff and its railroad connections.

Trains of greater lengths than 70 freight or other cars are handled by locomotives of modern type, of which those owned and operated by the plaintiff are typical, whose runs now extend for several hundred miles, in many cases passing through or across two or more states. The efficiency and economy of operation of such locomotives depend upon the ex-

tent to which the trains which they handle are heavy enough so that their tractive power may be utilized to the fullest practicable extent. The improved methods of operation, of which the operation of trains of more than 70 cars is an essential part, have practically eliminated car shortages, which were frequently experienced prior to 1924, and have made it possible to reduce greatly the stocks of merchandise formerly required to be carried in order [13] to protect against traffic congestion and delay: all of which has been of great benefit to the commerce of the country, and particularly to the states and communities served by plaintiff's lines, which is and are largely dependent upon prompt, efficient, and reliable railroad transportation at reasonable rates.

(e) The operation of freight trains containing substantially more than 70 freight or other cars, exclusive of caboose, and of passenger trains containing substantially more than 14 cars, subject to the requirements of traffic (which method of operation is herein, for convenience, referred to as "standard long-train operation"), is a general practice on the main trunk lines of all the major steam railroads throughout the United States, and on the main lines of railroad of the plaintiff, and its principal competitors and connections, except in Arizona and contiguous territory where the Arizona Train-Limit Law has extraterritorial effect. The operating conditions under which such standard long-train operation is carried on are substantially as favor-

able, generally speaking as those on the main lines of the plaintiff in Arizona. The practice of such standard long-train operation has not retarded and does not retard, but on the contrary expedites materially the movement of the traffic carried therein, and does not delay, but on the contrary promotes and makes possible the early delivery of such traffic.

Freight trains of more than 70 freight or other cars, exclusive of caboose, and passenger trains of more than 14 cars, are commonly, safely, and economically operated through the United States, outside of Arizona, over lines of railroad substantially similar to the main lines of the plaintiff in Arizona; and there is no reason, from the standpoint of safety, or otherwise, why the length of plaintiff's freight or passenger trains in Arizona should be limited as required by the Arizona Train-Limit Law.

(f) By its terms the Arizona Train-Limit Law applies to [14] and regulates trains only within Arizona. However, it is wholly impracticable to split up or consolidate trains at state boundary lines, unless terminals are there located. While plaintiff has a terminal at Yuma, adjoining the California-Arizona boundary line, its nearest New Mexico terminal upon the Yuma-Maricopa-Lordsburg line is at Lordsburg, New Mexico, about 23 miles east of the Arizona line. Upon the Tucson-Douglas-El Paso line there is no terminal between the Arizona-New Mexico boundary, and the terminal at El Paso, Texas, about 166 miles east of said boundary. No facilities now exist at or ad-

jacent to either of the points where plaintiff's two said main lnes cross the Arizona-New Mexico boundary, whereby westbound trains of greater lengths than permitted by the Arizona Law could be reduced in length so as to conform to said law, or eastbound trains conforming to the law's limitations consolidated into the larger units permitted by the laws of New Mexico; and no such facilities could be constructed at or adjacent to either or both of said boundary-line points except at great expense.

The inevitable result of the Arizona Law is therefore to control completely train lengths between the boundary line of Arizona and the aforesaid terminals in New Mexico and Texas nearest thereto. But, on account of the transportation service required and furnished for eastbound perishable freight, traffic requirements ordinarily forbid its delay, either while trains are being split up at the first terminal west of or at the Arizona boundary line, or while trains are being consolidated at the first terminal east of Arizona. Consequently, in many instances, eastbound perishable freight trains, originating at southern California points, must be made up into trains not longer than are permitted by the law, at such points of origin; and such short trains must be transported intact as far east as El Paso, Texas, more than 160 miles east of Arizona, at which point, be- [15] cause of the requirements of re-icing and re-classification for diversion pur-

poses, consolidation into larger train units may be effected with a minimum of interference and delay. The locomotive power and crews used to handle eastbound trains, of lengths conforming to the Arizona Law, from their originating points in California to Yuma, and from Lordsburg to El Paso, must be returned to their western termini; and it is therefore necessary either to run short (i. e., Arizona-size) westbound trains from El Paso and from Yuma, or to bring back the locomotives without load and the crews without work, but under pay.

(g) Solely by reason of plaintiff's compliance with said Arizona Train-Limit Law, the average and the maximum lengths of plaintiff's freight trains operated upon its aforesaid main lines across southern California, Arizona and New Mexico have been, now are and will continue to be greatly reduced below the average and maximum lengths which otherwise would obtain; by reason of which compliance with said Train-Limit Law, plaintiff has been compelled and will continue to be compelled to operate a substantially larger number of such trains and therefore to produce, as a result of such operations, a substantially greater number of train miles and locomotive miles for the handling of the same absolute volume of traffic, whether measured in cars handled or in car miles produced. The effect of such compliance with said Train-Limit Law is not and will not be confined to Arizona; for, as aforesaid, said Train-Limit Law operates and

will continue to operate regularly and completely to control the lengths of plaintiff's freight trains, and the number thereof to be operated, not only upon plaintiff's lines in Arizona, but also upon its lines in California at least as far west as Indio, and upon its lines in New Mexico and Texas at least as far east as El Paso, Texas.

Detailed cost studies made by the plaintiff show that the addi- [16] tional financial burden to which it is subjected by reason of the law, upon that portion of its main line which extends from Indio, California, via Yuma, Maricopa, and Lordsburg, to El Paso, amount to more than $300,000.00 each year, which figure relates to freight train operations upon said line only, and does not include any additional expense imposed upon and incurred by reason of the limitation of the law upon the lengths of passenger trains. If it were not for the law, substantial additional savings could also be made by the plaintiff in the operation of its freight trains upon its auxiliary main line through Phoenix, and its auxiliary main line from Tucson via Douglas to El Paso, both of which main lines constitute portions of its through routes from California and Arizona to destinations east thereof; although neither of these routes was included in the above mentioned detailed cost studies made by the plaintiff.

Substantial additional savings, also not included in said cost study or in the above figure of $300,-000.00, would also be made by plaintiff, by running and thus utilizing to the fullest practicable extent

the tractive power of large locomotives, between points outside of Arizona and points in said state; and by shifting such large locomotives between the Arizona lines and similar lines outside of Arizona, in order to take care of peak seasonal business, thereby reducing the aggregate number of locomotives required and increasing the use and efficiency of the locomotives used. From the standpoint of aggregate power, large locomotives cost less in proportion to their tractive effort than do smaller ones; and under standard long-train methods of operation plaintiff's investment in motive power would be reduced because less total tractive power, at a lower cost per unit, would be required to handle the total traffic. Furthermore, under standard long-train operation, substantially less fuel would be required, so that the cost of hauling company fuel would be sub- [17] stantially reduced.

(h) The standard long-train method of operation, heretofore and presently followed by plaintiff, except in Arizona and the adjacent districts where the Arizona Law operates with extraterritorial effect, results in safe, efficient and economical operation, at unit costs which are greatly reduced as compared to those experienced in prior years, and are also less than those incurred in Arizona and the contiguous territory where the Train-Limit Law operates with extraterritorial effect. Solely because of the Arizona law, plaintiff now is and will continue to be subjected to irreparable and continuing

financial burden and expense amounting to at least $300,000.00 per year, being the difference between the expense of the short-train method of operation required by the Arizona Law, and the expense of the standard long-train method of operation heretofore defined, which is presently being followed elsewhere than in Arizona and adjacent territory, and would be adopted and followed in Arizona and said adjacent territory if it were not for the Arizona Law.

(i) The effect of the law is greatly and directly to interfere with and delay plaintiff's interstate freight traffic while in the course of transportation out of, into, across, and within Arizona; and also greatly, directly and unreasonably to delay and interfere with the interstate freight traffic moving on plaintiff's main lines in California and New Mexico; because, as heretofore stated, the trains on those lines, destined to points within or beyond Arizona, must be initially made up, or split up either at the nearest terminals to Arizona or at terminals farther removed, so as to conform to the restrictions of the Arizona statute; and trains moving across Arizona, or from points within that state, destined to points in adjoining states or beyond, must be consolidated, either at the first terminals outside of Arizona [18] or at terminals farther removed, so as to avoid carrying them, with the increased operating and other expenses incident to such short-train operation, until they reach their destinations; and also because the increase in the

number of trains run, inevitably resulting from the operation of the law, causes the number of meetings and passings of the trains, both freight and passenger, incident to the operation of plaintiff's lines of railroad, to be greatly and disproportionately increased, over and above those which would be required if it were not for the law, with resulting delay to each and all of the trains involved in such meetings and passings.

VI.

Effect of the Law Upon Passenger-Train Operations.

(a) The passenger-train provisions of said Train-Limit Law are wholly arbitrary and unreasonable, and without any relation whatsoever to safety, efficiency, or economy of operation, and in fact result in imposing direct and irreparable financial burdens upon the plaintiff, and in increased hazards; moreover, the law has an even greater extraterritorial effect upon a passenger-train than upon freight-train operation. While the financial burden imposed upon passenger-train operation is not as great as that imposed by the law upon freight-train operation, nevertheless it is substantial in amount.

Except in the State of Arizona and in contiguous territory affected by the Arizona Train-Limit Law, passenger trains of more than 14 cars are regularly operated by plaintiff, and by other railroads gen-

erally, whenever and wherever traffic requirements make such operation advisable; and in the aggregate great numbers of such passenger trains are operated. The competition of other forms of transportation makes it imperatively necessary that passenger-train operation be carried on with the [19] utmost economy.

Because of the Arizona Train-Limit Law, many passenger trains of the plaintiff must be initially made up, or, before reaching that state, broken up, so as to comply with the limitations of said law. In order to minimize the effects of said law, and avoid breaking up trains, passenger-train cars are constantly being removed from passenger trains of more than 14 cars, and placed in shorter trains at terminals near Arizona, and at terminals farther removed, whenever and wherever such shifting may be accomplished with a minimum of interruption to traffic.

(b) The limitations fixed by said Train-Limit Law interfere with the movement of passenger-train equipment of all kinds, and particularly with the movement of empty equipment, which, on account of seasonal fluctuations in traffic, must at times be moved in one direction and at other times in the opposite direction. Such equipment could readily be handled on regular passenger trains, without interfering in any way with their ordinary operations, or with the safety or comfort of the passengers or the employes, if it were not for the law.

In addition to the passenger traffic carried on regular trains, which fluctuates greatly from day to day, in many cases special trains for or from Pacific Coast points, or for tours involving movement upon plaintiff's lines across Arizona, are chartered by parties, too large to be accommodated adequately in trains of 14 cars or less, which said parties desire for social or business reasons to travel together. They can travel by plaintiff's Arizona lines only if willing to be subjected to the inconvenience of having a part of the party handled in a second train, or having one or more baggage or other cars not actually occupied by them hauled in some other train, while in Arizona. In consequence, plaintiff is placed at a disadvantage in soliciting and [20] handling such business in competition with other lines running to and from the Pacific Coast, north of Arizona; and the parties who travel via plaintiff's lines are subjected to inconvenience, delay, and interference while on their trips within and/or across Arizona.

Solely as a result of said Train-Limit Law, plaintiff is forced to run numerous extra trains, involving substantial additional expense, not only for the operation of such extra trains themselves, but also in returning the extra crews and extra engines from the destination points of the extra trains to their home terminals, and of sending the extra engines and extra crews from their home terminals to the points where the extra trains originate.

(c) Plaintiff has made no detailed cost-studies for the purpose of determining precisely the additional and unnecessary expense presently resulting from the limitation upon passenger-train lengths contained in said Train-Limit Law, but knows that each year, solely by reason of said law, a substantial number of extra trains are required to be run within and across the State of Arizona, that much equipment is required to be held out and forwarded on following trains, that it is greatly handicapped in the operation of its passenger trains and in the solicitation of its passenger traffic, and that it is subjected to delay and interference both within and outside of Arizona, by reason of the necessity of shifting cars from train to train in connection with the splitting up, in compliance with said law, of the trains destined to points within or beyond Arizona, and the consolidation of trains after leaving Arizona so as to reduce the increased expenses caused by the Arizona Law as soon as practicable; and plaintiff alleges that said expenses are and will continue to be irreparable, substantial, and of constant occurrence, and that they do and will amount to many [21] times $3000.00 each year, in actual out-of-pocket expenditures; that said additional unnecessary expenditures could, and would, be saved and avoided, if plaintiff were relieved of the necessity of complying with said law by a final judgment declaring said law to be invalid and unconstitutional, as herein prayed for.

VII.

The Law Not a Reasonable Safety Measure.

Said Train-Limit Law is arbitrary and unreasonable, and bears no reasonable relation to the health, comfort or safety of persons or the safety of property, and does not operate to promote the health or safety of employees, or passengers, or of the public otherwise. To the contrary, said law creates certain hazards which would not exist, except for the law, and increases other hazards of railroad operation. Said law is wholly unjustified as a supposed regulation by the State of Arizona in the purported interest of the health and safety of persons or property; it takes the plaintiff's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, for the following reasons among others:

(a) Said Train-Limit Law is permissible and sustainable, if at all, only under the reserved police power of the State.

(b) Daily, plaintiff has tendered and delivered to it a large volume of freight, and a large number of passengers, for transportation as a common carrier in interstate commerce and in Arizona intrastate commerce. Its obligation as a common carrier is to receive, transport, and deliver such freight and passengers with all practicable safety, expedition and economy, and to furnish to shippers at receiving points on its lines a supply of empty cars, and to passengers who offer themselves for trans-

portation a supply of accommodations, suitable and [22] adequate for their needs.

Those obligations plaintiff performs to the best of its ability; and in so doing it is necessary for it to operate, and it frequently and as a standard practice does operate, over its lines (except within Arizona and the adjacent territory where the Arizona Law has extraterritorial effect) freight trains of substantially more than 70 cars, exclusive of caboose, and passenger trains of more than 14 cars. Practically all of its freight trains carry interstate freight to a substantial extent; many of them almost entirely. Practically all its passenger trains carry interstate passengers, and mail, baggage, and express moving in interstate commerce. Such long-train methods of operation are not only more economical and more expeditious, as heretofore alleged, but are also substantially safer than the methods of handling freight and passenger traffic, in Arizona and adjacent territory, which are compelled by the terms of the Arizona Law.

(c) On plaintiff's lines in Arizona, as well as on all steam railroads, the frequency of accidents to trains and of resulting casualties to those who are exposed to the hazards of train operation, including employes and members of the public not riding upon such trains, and employes and passengers on passenger trains, is directly related to the number of train units operated; and when more train units are operated than are necessary to handle a given

amount of traffic, all hazards incident to the handling of that traffic are correspondingly increased. As heretofore alleged, the effect of said Train-Limit Law is proximately and directly to cause plaintiff to operate in Arizona and in the adjacent contiguous territory heretofore mentioned many more freight and passenger train units than it would operate if it were relieved of the necessity of compliance with said Train-Limit Law by a final judgment declar- [23] ing said law to be invalid and unconstitutional, and therefore correspondingly to increase the hazards of plaintiff's train operations in Arizona and said affected contiguous territory.

(d) There is no hazard of freight train operation, either generally or as conducted by plaintiff, that can reasonably be said to be related to the number of cars in a freight train, or that can be or is removed or minimized or measurably reduced, by limiting freight trains in Arizona or elsewhere to 70 freight or other cars, exclusive of caboose. There is no hazard of passenger train operation, either generally or as conducted by plaintiff, that can reasonably be said to be related to the number of cars in a passenger train, or that can be or is removed or minimized or measurably reduced, by limiting passenger trains in Arizona or elsewhere to 14 cars.

To the contrary, there are certain distinct and well-known hazards in train operation that are productive of accidents and casualties, and injuries to persons and damage to property, and that are defi-

nitely related to and increase with the number of train units operated, viz.:

(1) head-end and rear-end collisions of trains, with each other and with other vehicles using the same track;

(2) grade-crossing accidents, the hazard of which to a given number of users of a crossing is directly proportional to the number of trains run;

(3) casualties due to additional meets and passings of trains, in connection with which employes must go on top of trains and also leave and board them to open or after closing switches, and for other purposes made necessary by the meet or pass. The number of meets and passings does not vary in proportion to the trains run, but more nearly in proportion to the square of the number of trains run;

(4) accidents in yards, which are related to the number [24] of trains made up or broken up in the yards;

(5) accidents due to defects in or failures of locomotives, the hazard of which ratably increases with the number of locomotives in actual service.

(e) There is, moreover, a large class of hazards in all train operations, which produce accidents and casualties and which are directly related to and increase with the operation of an unnecessary and additional number of trains and the consequent employment and service of a correspondingly additional number of train-men and engine-men to man those additional trains.

More than half of the accidents and casualties that occur in the operation of steam railroads in Arizona and elsewhere are caused by the negligence of, disobedience of rules by, or inadvertence of employes. To require plaintiff to operate more trains than are reasonably necessary to handle the traffic offered to it will inevitably be to increase the hazard to the public, to employes, and to property, by increasing the number of opportunities for individual negligence, disobedience of rules and inadvertence by the employes handling such traffic. Further, by increasing the number of employes necessary to handle a given amount of traffic, the number of individuals who are subject to the hazard of injury in the handling of that traffic is thereby correspondingly increased.

(f) It is not reasonably necessary to limit freight trains to 70 freight or other cars, exclusive of caboose, or passenger trains to 14 cars, in order to prevent or reduce accidents due to defects in or failure of equipment of any class. No accident from these causes has occurred on plaintiff's freight trains of more than 70 cars in length, exclusive of caboose, or on plaintiff's passenger trains of more than 14 cars, of which it can reasonably be said that the same accident would not, or probably would not, have occurred if the train had been of [25] the length permitted by the Arizona Law, or even substantially shorter. Defects in and failures of locomotives are solely related to the individual locomotive; and defects in and failures of cars are re-

lated to the number of cars run, and not to the trains into which they are divided.

(g) There is no reason or basis for any claim that for reasons of safety or for any other reasons freight trains in Arizona should be limited to 70 freight or other cars, exclusive of caboose, or passenger trains to 14 cars; the Arizona Train-Limit Law does not and will not only not decrease whatever general or special hazard there is existent and inherent in plaintiff's freight and passenger train operations in Arizona, but does and will, to the contrary, materially impair and substantially lessen the safety of plaintiff's freight and passenger train operations in Arizona, by creating certain individual hazards which would not otherwise exist, and by increasing other hazards inherent in train operation as hereinbefore described.

VIII.

The Traffic Across Arizona Preponderantly Interstate.

Substantially all of the freight and passenger traffic transported on plaintiff's main lines across the State of Arizona consists of interstate traffic, by far the greater part of which either originates in the State of California and is destined to points east of the Rocky Mountains, or originates at points east of the Rocky Mountains and is destined to California points, and is commonly known as transcontinental traffic. A large part of the remainder of

such interstate traffic consists of traffic moving to or from the State of Arizona.

A substantial portion of the traffic originating in California [26] as well as in Arizona, and destined to points east of Arizona consists of perishable freight (i. e., fruits and vegetables) which are required to be transported in as large train units as practicable, so as not to delay their receipt in eastern markets, where prices constantly fluctuate, and so as to prevent loss of value by decay and deterioration.

The traffic handled upon plaintiff's lines extending across the States of Nevada and Utah likewise consists almost entirely of interstate traffic, and principally of transcontinental traffic as above defined; and in large part of perishable products, moving from the States of California and Oregon to eastern destinations, and of traffic moving to the Pacific Coast states; and in many respects is thus closely similar to the traffic carried upon plaintiff's lines across the State of Arizona.

The Arizona Train-Limit Law, by preventing the proper and expeditious handling of the aforesaid interstate traffic from, to and across the State of Arizona, by limiting the lengths of the train units in which it may be handled, thereby unnecessarily and unreasonably burdens, delays, and interferes with the interstate commerce in which it moves.

The traffic on the interstate passenger trains operated by plaintiff upon its lines across the State

of Arizona consists, almost in its entirety, of passengers, baggage, and express moving from one state to another; moreover, practically all of said interstate passenger trains carry United States mail. The inevitable effect of said Arizona Law is frequently to delay such interstate passenger trains, as they enter or are about to enter, or are leaving or about to leave, or are in transit across the State of Arizona, and thereby unreasonably and unnecessarily to burden, delay, and interfere with the interstate commerce carried on by means of said trains. [27]

IX.

The Subject of Train Limitation One of National Concern.

The permissible number of cars in an interstate train is a subject of national, and not local, concern, and one which, if any regulation at all is to be required, should be regulated by the Federal Government and not by the individual states, in that it is wholly impracticable to move railroad terminals to state lines, or to split or consolidate through trains except at terminals; and at some terminals freight trains containing perishable freight cannot be delayed for purposes of splitting up or consolidation. If other states should regulate train lengths in accordance with their several notions as to what would be proper within their respective boundaries, all such regulations necessarily would have wide extraterritorial effect, as

does the Arizona Law, and to comply with their conflicting provisions would seriously embarrass through interstate train operations.

X.

The Law Impairs the Usefulness of Plaintiff's Facilities.

The necessary effect and operation of said Train-Limit Law is directly, substantially, and continuously to impair the use and usefulness of the facilities used and usable by the plaintiff, in the carriage of interstate commerce across, into, through, and out of, the State of Arizona.

XI.

The Law Imposes Direct Burdens Upon Interstate Commerce.

The additional and unnecessary expense of interstate freight train and interstate passenger train operation, more fully set [28] forth heretofore, to which plaintiff is subjected as hereinbefore alleged, and which plaintiff could avoid if it were not for said Train-Limit Law, is a substantial and direct burden upon the interstate commerce carried on by plaintiff into, out of, across and through the State of Arizona by means of its said interstate trains.

XII.

The Law Violates the Commerce Clause of the Federal Constitution.

Said Train-Limit Law is unconstitutional and void, as to each and all of the interstate trains of the plaintiff, in that it conflicts with and violates the Commerce Clause (Paragraph 3 of Section 8, Article I) of the Constitution of the United States; because:

(a) The permissible number of cars in an interstate railroad train passing from one state to another, or passing from one state through another into a third, or passing through a number of states, is a subject over which exclusive legislative jurisdiction was and is vested in Congress by said Commerce Clause;

(b) The necessary effect of said law is: (1) to impose a direct and substantial burden upon, and directly and substantially to interfere with, delay, and regulate, the operation of plaintiff's interstate freight and passenger trains across and within Arizona, as well as in California and New Mexico; (2) to determine the number of interstate trains to be run by plaintiff, not only within Arizona, but also within adjoining portions of California and New Mexico; and (3) to impair the usefulness of the facilities used as well as those usable by the plaintiff in the carriage of interstate commerce across, through, into, and out of, the State of Arizona. [29]

XIII.

The Law Violates the Due-Process Clause of the XIV Amendment.

Said Train-Limit Law is further unconstitutional and void, and in violation of the aforesaid Commerce Clause of the Constitution, and also operates unreasonably and arbitrarily to deprive plaintiff of its property without due process of law, in violation of the Due-Process Clause of the Fourteenth Amendment to the Constitution of the United States, because:

(a) It fixes maximum train lengths very much lower than those which generally obtain elsewhere throughout the United States, under operating conditions substantially the same as those on plaintiff's main lines in Arizona;

(b) It makes no allowance for grade or other operating conditions, or for the construction, type, weight, or length of the cars composing the train, or whether such trains are loaded or empty, and if loaded the weight of the load;

(c) It imposes a great and substantial burden of expense upon, interference with, and delay to, interstate commerce and impairs the usefulness of plaintiff's transportation facilities; and

(d) It bears no reasonable relation to health or safety.

XIV.

The Law in Conflict with Federal Legislation.

Said Train-Limit Law is further void, invalid, and unenforceable, for the reason that it is in conflict with, and/or an infringement upon, legislation heretofore enacted by Congress, pursuant to its powers under the Commerce Clause of the Constitution, in the following respects:

(a) To the extent that said Train-Limit Law is or may be intended to prevent the use of heavy locomotives in the State of [30] Arizona, and thus to regulate locomotive sizes, it is an infringement upon and in conflict with statutes enacted by Congress pursuant thereto, having the same or a like purpose, to wit, the Boiler Inspection Act of February 17, 1911 (36 Stat. 913), as amended in 1915, (38 Stat. 1192) and in 1924 (43 Stat. 659), being Sections 23 to 35, inclusive, of Title 45 of the United States Code, wherein and whereby full power over the size, design, weight or construction of locomotives was delegated to and is now vested in the Interstate Commerce Commission;

(b) To the extent to which said Train-Limit Law is intended to or has or may have the effect of limiting the number of cars in a freight or passenger train to the maximum number which properly and with reasonable safety can be controlled in one train by the type of air brakes and their appurtenances now used on such trains, or by any other form of train-control devices or other safety devices,

it is void, in that it attempts to and does enter a legislative field already entered and therefore completely occupied by Congress: the Congress having, under the Commerce Clause, by the enactment of the power-brake provisions of the Safety Appliance Act, as amended (Sections 1 and 9 of Chapter 1 of Title 45 of the United States Code), and the provisions of Section 26 of the Interstate Commerce Act (Section 26 of Chapter 1 of Title 49, of the United States Code), delegated to the Interstate Commerce Commission full and complete authority to investigate and determine the adequacy of the air-brakes, and their appurtenances, and other forms of train-control and other safety devices, used or proposed to be used upon locomotives and cars operated in interstate commerce, and by order to prescribe the form and type of such air-brakes, appurtenances and other train-control and safety devices, and from time to time to issue such amendatory and supplementary orders as it may deem necessary or desirable in the exercise of the power and jurisdic- [31] tion thus conferred by Congress; and the Congress having, in particular, in and by said statutes, necessarily empowered said Interstate Commerce Commission to determine whether the types of air-brakes, and their appurtenances, presently used or proposed to be used upon trains in interstate commerce, are or will be adequate and effective, safely and properly to control and to stop trains of the lengths now being operated in inter-

state commerce, both in the State of Arizona and elsewhere, by the plaintiff and by other railroad common carriers throughout the United States.

XV.

Nature of the Controversy.

An actual controversy has arisen and now exists, with respect to the validity and constitutionality of said Arizona Train-Limit law, and the rights, duties, powers and obligations of the parties to this suit under said law; in that plaintiff, on the one hand, as heretofore set forth at length, claims and maintains that said train-limit law is wholly void, unconstitutional and unenforceable, in so far as it applies or may apply to any of the plaintiff's railroad operations within or without Arizona; whereas defendant, on the other hand, claims and maintains that said train-limit law is valid and constitutional in all respects and is applicable to and binding upon plaintiff in its ralroad operations in Arizona; and said defendant further claims and maintains that, in the event of violation of said law by plaintiff, it is and will be his duty forthwith to institute or direct the institution of proceedings to recover from plaintiff the penalties provided in said law and otherwise to enforce compliance therewith by plaintiff.

If it were not for said law, and the position and opinion with regard to the constitutionality and validity thereof maintained by defendant, as afore-

said, plaintiff could and would at once begin and hereafter continue to operate a substantial number of its [32] freight, and passenger trains into, within, through and across Arizona, without regard to the restrictions and limitations imposed by said law; and would thereby and thereupon at once begin and thereafter continue to effect the increased economy and efficiency and the greater safety of operation which, as heretofore set forth in detail, are and would be attendant upon and caused by such long-train operation.

Plaintiff is presently unwilling and unable to undertake such long-train operations within, through and across Arizona, in the absence of a final determination and declaration that said law is invalid and unconstitutional as applied to its operations, because of the heavy cumulative penalties which, as hereinafter described, would shortly accrue if such a course were followed, and the law should be sustained in prosecutions instituted by or at the direction of defendant for the purpose of enforcing said law and recovering the penalties therein provided.

By reason of the aforesaid conflicting claims of the plaintiff and defendant, and the actual controversy thereby created and now existing, it is necessary that this Court render its declaratory judgment and decree, adjudging and determining whether said law be constitutional and valid, and adjudging and determining the rights, powers,

duties and obligations of each of the parties hereto under said law, and thereby finally adjudging and determining the aforesaid controversy.

XVI.

Extent and Cumulative Character of Penalties for Violation of Train-Limit Law.

In handling the interstate freight traffic moving over its lines across the State of Arizona, plaintiff operates daily in each direction between its freight terminals at Yuma, Arizona, and Gila, Arizona, and between its freight terminals at Gila and Tucson, [33] Arizona, and between its freight terminals at Tucson and Lordsburg, New Mexico, a substantial number of through interstate freight trains, all of which move over the line heretofore described as the Yuma-Maricopa-Lordsburg Line. The number of such trains so operated each day varies according to the demands of traffic and ranges from approximately 75 trains per month on the average, in each direction between Yuma and Gila, and 75 trains per month in each direction between Gila and Tucson, and 90 trains per month in each direction between Tucson and Lordsburg, during the month of November, to 180 trains per month in each direction between Yuma and Gila, and 180 trains per month in each direction between Gila and Tucson, and 200 trains per month in each direction between Tucson and Lordsburg, during the month of June; which said months of November and June repre-

sent the months during the year when such interstate traffic across Arizona is lightest and heaviest, respectively.

If plaintiff were to disregard the provisions of the Arizona Train-Limit Law, and were to attempt to operate each of its aforesaid freight trains within or across the State of Arizona with more than 70 cars each, exclusive of caboose, it would thereby become subject to prosecution for the recovery of the severe penalties provided by Section 3 of said Train-Limit Law, which said Section provides a penalty of not less than $100.00 nor more than $1,000.00 for each such violation. As heretofore alleged, said defendant claims and maintains that it is and will be his duty, as Attorney General, to prosecute and sue plaintiff for each and every violation of said Act which it may commit. Plaintiff would thus become liable for penalties, in the event the defendant should institute such prosecutions, as directed and required by said Section 3, which, in the event said law should be sustained in said prosecutions, would range, on the average, from $1,600.00 to $16,000.00 per day, during the period of lightest [34] traffic, and from $3,700.00 to $37,000.00 per day during the period of heaviest traffic; and said penalties would be and will be cumulative, and may or might be recovered by said defendant, in a single prosecution or in a series of prosecutions instituted for that purpose, unless said law be declared invalid and unconstitutional by final judgment as herein prayed for. Said penalties would be addi-

tional to any penalties which might be incurred by the operation of freight trains of more than 70 cars, exclusive of caboose, upon the Wellton-Phoenix-Picacho or Tucson-Douglas main lines, hertofore described, or upon any of the branch lines in Arizona, or of passenger trains of more than 14 cars upon any part of the plaintiff's lines in Arizona.

If, on the other hand, plaintiff should continue to comply with said law, and should continue to operate all of its freight trains upon its lines within the State of Arizona, and the adjacent districts in which the law now has extraterritorial effect, with not more than 70 freight or other cars, exclusive of caboose, and were to continue to operate all of its passenger trains within Arizona and said adjacent districts with not more than 14 cars each, the added expense thus imposed upon plaintiff, solely as the result of said compliance, would be and will continue to be, as heretofore more fully alleged, not less than $300,000 per year, or, on the average, not less than approximately $822.00 per day, all of which such added expense is and will be continuous and irreparable.

XVII.

Lack of Adequate Remedy at Law.

Plaintiff, as a citizen and resident of the State of Kentucky, has no plain, speedy or adequate remedy at law in this or any other court of the United States of America.

Plaintiff, irrespective of its residence and citizenship in a state other than the State of Arizona, has no plain, speedy or adequate [35] remedy at law in any court of the State of Arizona, or in any other jurisdiction.

Prayer for Relief.

Wherefore, inasmuch as it is without any adequate remedy at law for its protection, plaintiff prays:

(1) That after due hearing held in accordance with law this Court do declare, adjudge and decree the rights, powers, duties and obligations of the plaintiff and the defendant with respect to the aforesaid Arizona Train-Limit Law, and with respect to the controversy which has arisen and now exists as between the plaintiff and the defendant regarding the validity, constitutionality and enforceability of said train-limit law; and that in particular this Court do declare, adjudge and decree:

(a) That plaintiff has no plain, speedy or adequate remedy at law for the damage and injury which result from its enforced compliance with said Arizona Train-Limit Law, and that such damage and injury are and will continue to be great and irreparable, unless plaintiff be relieved, by final judgment declaring said law to be invalid and unconstitutional as to the plaintiff, from the necessity of continuing to comply with said law;

(b) That said Arizona Train-Limit Law is arbitrary and unreasonable in and of itself, is void and

in violation of the provisions and prohibitions of the Constitution of the United States hereinbefore specified, and infringes upon and violates the several acts of Congress hereinbefore enumerated, and is *therefor* wholly invalid and unenforceable as to the plaintiff or any of the plaintiff's operations within the State of Arizona;

(2) That the plaintiff have such other and further or different relief as may be equitable and proper in the premises and as to the Court may seem meet.

Plaintiff further prays to the Court to grant not only a declara- [36] tory judgment and decree conformable to the prayer of this complaint, but also that a summons of the United States of America issue out of and under the seal of this Honorable Court directed to the defendant Joe Conway, commanding him on a day certain therein named to be and appear before this Court then and there to answer, but not under oath (answer under oath being hereby expressly waived), all and singular the premises, and to abide by such judgment and decree as may be made herein.

SOUTHERN PACIFIC
COMPANY,
By J. H. DYER,
Vice-President (in Charge of
Operations).
ALEXANDER B. BAKER,
LOUIS B. WHITNEY,
Solicitors for Plaintiff.

Attest:
R. G. HILLEBRAND,
Assistant Secretary
(Corporate Seal of Southern Pacific Company)

C. W. DURBROW,
HENLEY C. BOOTH,
BURTON MASON,
Of Counsel. [37]

Verification.

State of California,
City and County of San Francisco—ss.

J. H. Dyer, being first duly sworn, deposes and says:

That he is an officer, to wit, Vice President in charge of operations, of Southern Pacific Company, the corporation named as plaintiff in the foregoing complaint; that as such officer he makes this verification for and on behalf of said corporation;

That he has read said complaint and knows the contents thereof, and that the same is true of his own knowledge, except as the matters therein stated on information and belief, and as to such matters he believes it to be true.

J. H. DYER.

Subscribed and sworn to before me this 15th day of April, 1939.

[Notarial Seal] FRANK HARVEY,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Apr 18, 1939. [38]

[Title of District Court and Cause.]

MOTION TO DISMISS

Now comes the defendant, Joe Conway, and moves to dismiss the Complaint filed in the above entitled cause for the following reasons:

I.

It appears upon the face of the Complaint that there is a lack of jurisdiction over the subject matter.

II.

The Complaint fails to state a claim upon which relief can be granted.

III.

The Complaint reveals no "actual controversy" between the parties as required by the Federal Declaratory Judgment Act of 1934 (28 U. S. Code, Section 400).

Respectfully submitted,
CHARLES L. STROUSS
W. E. POLLEY
Attorneys for Defendant
703 Heard Building
Phoenix, Arizona

[Endorsed]: Filed May 5, 1939. [39]

PLAINTIFF'S EXHIBIT No. 1

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

State of Arizona
County of Maricopa—ss.

Joe Conway, being first duly sworn upon oath, deposes and says: That he is the same Joe Conway who is named as defendant in the above entitled cause; that no actual controversy, or any controversy whatsoever, has arisen or exists between the plaintiff and the defendant with respect to the validity or constitutionality of the Arizona Train-Limit Law, or with respect to the rights, duties, powers or obligations of the parties to this suit under said law; that he does not claim or maintain, and has not claimed or maintained, that said Arizona Train-Limit Law is valid or constitutional in all respects, or in any respects, or is applicable to or is binding upon plaintiff in its railroad operations in Arizona, or that in the event of violation of said law by plaintiff it is or will be affiant's duty to institute or to direct the institution of proceedings to recover from the plaintiff the penalties provided in said law or otherwise to enforce compliance therewith by plaintiff. In this connection affiant says that in his individual capacity, the capacity in which he is here sued, the affiant has no duty or authority in connection therewith, and has no interest whatsoever in the determination of the

validity or constitutionality of said Arizona Train-Limit Law; that if said [40] Arizona Train-Limit Law is unconstitutional, as plaintiff contends, affiant in his official capacity as Attorney General of the State of Arizona has no duty or authority to enforce said Arizona Train-Limit Law and has no duty to perform in connection with said law; that the formulating of an opinion by the affiant concerning the validity or constitutionality of the said Arizona Train-Limit Law and of the duty of the affiant in his official capacity in connection therewith and in the enforcement thereof requires and will require a great amount of study and investigation into facts, information and data in connection therewith; that affiant is informed and believes and on information and belief alleges that in a proceeding in this Court (Southern Pacific Company vs. K. Berry Peterson, Attorney General of the State of Arizona, Equity No. 196, Phx.), wherein the validity or constitutionality of said Arizona Train-Limit Law was in issue but not determined, approximately 25 volumes of evidence material and relevant to facts bearing upon the question of the validity or constitutionality of said Arizona Train-Limit Law were received, in addition to numerous intricate and involved exhibits; that affiant, either in his individual or official capacity, has made no study or investigation, and has no knowledge or information concerning, the facts, data or information relevant or material to, or bearing upon the question of the validity or constitutionality of said

Arizona Train-Limit Law, and has formulated no opinion or belief, and makes no contention, either as to the validity, constitutionality or unconstitutionality of said Arizona Train-Limit Law, or as to affiant's duties thereunder, or as to the application of said Arizona Train-Limit Law to plaintiff's railroad operations in Arizona; that no occasion has arisen for affiant to investigate the constitutionality of said Arizona Train Limit Law because there has been no report or information furnished to affiant of any violation of said Arizona Train-Limit Law in Arizona, and affiant has no [41] knowledge or information that said law ever has been violated.

Further affiant sayeth not.

JOE CONWAY

Subscribed and sworn to before me, a Notary Public, this 5th day of May, 1939.

[Seal] GLADYS L. ARMSTRONG
Notary Public

My Commission Expires July 16, 1941.

[Endorsed]: Filed May 5, 1939.

[Endorsed]: Pltfs. Exhibit No. 1. Admitted and Filed Dec. 12, 1939. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Wm. H. Loveless, Chief Deputy Clerk. Case No. Civ-31 Phx. S. P. Co. vs. Joe Conway. [42]

[Title of District Court and Cause.]

PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S AFFIDAVIT FILED "IN SUPPORT OF MOTION TO DISMISS."

Now comes the above-named plaintiff, and moves the Court to strike from the files in the above-entitled cause the affidavit of the defendant Joe Conway heretofore filed in this cause on or about the 5th day of May, 1939, which said affidavit is styled "Affidavit in Support of Motion to Dismiss"; and in support of said motion assigns the following grounds:

(1) Said affidavit is wholly irrelevant and immaterial to any issue or issues raised or presented by the defendant's said motion to dismiss the complaint on file herein.

(2) Said affidavit is impertinent, in that the same is not relied upon, or in any manner referred to, in the defendant's aforesaid motion to dismiss.

(3) Said affidavit is sham and insincere.

(4) There is no authority for the filing or consideration of said affidavit. [43]

This motion is made pursuant to the provisions of Rule 12(f) of the Rules of Civil Procedure of the District Courts of the United States.

Respectfully,

ALEXANDER B. BAKER
LOUIS B. WHITNEY
703 Luhrs Tower, Phoenix, Arizona.
Solicitors for Plaintiff.

C. W. DURBROW
HENLEY C. BOOTH
BURTON MASON
65 Market Street,
San Francisco, California.
Of Counsel.

[Endorsed]: Filed May 15, 1939. [44]

[Title of District Court.]

April 1939 Term At Phoenix

MINUTE ENTRY OF MAY 22, 1939
(Phoenix Division)

Honorable Dave W. Ling,
United States District Judge, Presiding.

[Title of Cause.]

Defendant's Motion to Dismiss and Plaintiff's Motion to strike Affidavit in Support of Motion to Dismiss come on regularly for hearing this day.

Messrs. Baker and Whitney appear as counsel for the plaintiff. Charles L. Strouss, Esquire, and W. E. Polley, Esquire, appear as counsel for the defendant.

On motion of Alexander Baker, Esquire,

It Is Ordered that Burton Mason, Esquire, be entered as associate counsel for the plaintiff.

Argument is now had by respective counsel, and

It Is Ordered that said Motion to Dismiss and said Motion to Strike Affidavit in Support of Mo-

tion to Dismiss be submitted and by the Court taken under advisement. [45]

[Title of District Court.]

April 1939 Term At Phoenix

MINUTE ENTRY OF JUNE 24, 1939
(Phoenix Division)

Honorable Dave W. Ling,
United States District Judge, Presiding.

[Title of Cause.]

Defendant's Motion to Dismiss and Plaintiff's Motion to Strike Affidavit having been argued, submitted and by the Court taken under advisement, and the Court having duly considered the same and being fully advised in the premises,

It Is Ordered that said Motion to Dismiss be and it is denied, and that said Motion to Strike Affidavit be and it is denied. [46]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Joe Conway, and answering the plaintiff's complaint herein admits, denies and alleges as follows:

I.

There is a want of jurisdiction in that no case or controversy is presented within the judicial power of the United States.

II.

There is a want of jurisdiction in that the suit is one against the State of Arizona by a citizen of another State in Violation and in contravention of the Eleventh Amendment to the Constitution of the United States.

III.

Defendant admits the allegations contained in subsection (a) of paragraph I of plaintiff's complaint.

IV.

Answering subsection (b) of paragraph I of plaintiff's complaint defendant admits he is sued as an individual and not in his official capacity; admits that he is a citizen of the State of Arizona residing in the City of Phoenix, County of Maricopa, in said state, and is the duly elected, qualified and acting Attorney General of the State of Arizona; defendant denies that under the Constitution or laws of the State of Arizona power or authority is vested in, or the duty is imposed upon, defendant in his individual [47] capacity to commence or prosecute, or to direct the institution or prosecution of suits for penalties for a violation of the Arizona Train-Limit Law; and in this connection defendant alleges that only if said Arizona Train-Limit Law is con-

stitutional is any power or duty imposed upon the defendant in his official capacity to commence or prosecute, or to direct the institution or prosecution of, suits for penalties for any violation of the said Arizona Train-Limit Law; and that if, as plaintiff alleges and contends, said Arizona Train-Limit Law is unconstitutional, then neither under the Constitution nor the laws of the State of Arizona is any power vested in, nor any duty imposed upon the defendant in his official capacity to commence or prosecute, or to direct the institution or prosecution of, suits for penalties for a violation of said Arizona Train-Limit Law, or in any manner whatsoever to enforce said Arizona Train-Limit Law; in this connection defendant further alleges that the formulating of an opinion by the defendant concerning the validity or constitutionality of the said Arizona Train-Limit Law and of the duty of the defendant in his official capacity in connection therewith and in the enforcement thereof requires and will require a great amount of study and investigation into facts, information and data in connection therewith; that defendant is informed and believes and on information and belief alleges that in a proceeding in this Court (Southern Pacific Company vs. K. Berry Peterson, Attorney General of the State of Arizona, Equity No. 196, Phx.), wherein the validity or constitutionality of said Arizona Train-Limit Law was in issue but not determined, approximately twenty-five volumes of evidence material and relevant to facts bearing upon

the question of the validity or constitutionality of said Arizona Train-Limit Law were received, in addition to numerous intricate and involved exhibits; that defendant, either in his individual or official capacity, has made no study or investigation, and has no knowledge or information concerning, the [48] facts, data or information relevant or material to, or bearing upon the question of the validity or constitutionality of said Arizona Train-Limit Law, and has formulated no opinion or belief, and makes no contention, either as to the validity, constitutionality or unconstitutionality of said Arizona Train-Limit Law, or as to defendant's duties thereunder, or as to the application of said Arizona Train-Limit Law to plaintiff's railroad operations in Arizona; that no occasion has arisen for defendant in his official capacity to investgate the constitutionality of said Arizona Train-Limit Law because there has been no report or information furnished to defendant of any violation of said Arizona Train-Limit Law in Arizona, and defendant has no knowledge or information that said law ever has been violated, and in his individual capacity defendant has no interest whatsoever in the investigation or determination of the constitutionality or unconstitutionality of the Arizona Train-Limit Law.

V.

Defendant denies each and every, all and singular, the allegations contained in subsection (a) of paragraph II of plaintiff's complaint.

VI.

Answering subsection (b) of paragraph II of plaintiff's complaint defendant denies that there is any matter whatsoever in controversy between the plaintiff and the defendant and denies that any controversy exists between plaintiff and defendant.

VII.

Answering subsection (c) of paragraph II of plaintiff's complaint defendant denies that this suit arises under the Constitution or laws of the United States for the reason that defendant makes no contention either as to the constitutionality or unconstitutionality of the Arizona Train-Limit Law and no controversy exists between plaintiff and defendant within the judicial power [49] of the United States Courts.

VIII.

Answering subsection (d) of paragraph II of plaintiff's complaint defendant alleges that he has no knowledge or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said subsection (d); that he is without funds, except his individual and personal funds, with which to investigate, procure or present evidence concerning the matters alleged in said subsection (d), or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon; that defendant in his individual capacity, the capacity in which he is here sued, has no interest whatsoever in investigating the matters

and things alleged in said subsection (d), or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or things presented in said subsection (d); that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to taking evidence thereon, defendant admits the allegations of said subsection (d).

IX.

Answering subsection (e) of paragraph II of plaintiff's complaint defendant denies that facts or circumstances set forth in plaintiff's complaint necessitate or justify the exercise of the jurisdiction of this Court herein; denies that this Court has jurisdiction herein for the reason that no controversy has arisen or exists between plaintiff and defendant within the judicial power of United States courts.

X.

Answering paragraph III of plaintiff's complaint defendant alleges that he has no knowledge or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph III; that he is without funds, except his individual and personal funds, with which to investigate, procure or present [50] evidence concerning the matters alleged in said paragraph III, or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon; that defendant in his individual capacity,

the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said paragraph III, or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or things presented in said paragraph III; that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to taking evidence thereon, defendant admits the allegations of said paragraph III.

XI.

Defendant admits the allegations contained in paragraph IV of plaintiff's complaint.

XII.

Answering paragraph V of plaintiff's complaint defendant alleges that he has no knowledge or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph V; that he is without funds, except his individual and personal funds, with which to investigate, procure or present evidence concerning the matters alleged in said paragraph V, or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon; that defendant in his individual capacity, the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said paragraph V, or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or things presented in

said paragraph V; that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to taking evidence thereon, defendant admits the allegations of said paragraph V.

[51]

XIII.

Answering paragraph VI of plaintiff's complaint defendant alleges that he has no knowledge or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph VI; that he is without funds, except his individual and personal funds, with which to investigate, procure or present evidence concerning the matters alleged in said paragraph VI, or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon; that defendant in his individual capacity, the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said paragraph VI, or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or things presented in said paragraph VI; that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to taking evidence thereon, defendant admits the allegations of said paragraph VI.

XIV.

Answering paragraph VII of plaintiff's complaint defendant alleges that he has no knowledge

or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph VII; that he is without funds, except his individual and personal funds, with which to investigate, procure or present evidence concerning the matters alleged in said paragraph VII, or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon; that defendant in his individual capacity, the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said paragraph VII, or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or things presented in said paragraph VII; that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to [52] taking evidence thereon, defendant admits the allegations of said paragraph VII.

XV.

Answering paragraph VIII of plaintiff's complaint defendant alleges that he has no knowledge or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph VIII; that he is without funds, except his individual and personal funds, with which to investigate, procure or present evidence concerning the matters alleged in said paragraph VIII, or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon;

that defendant in his individual capacity, the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said paragraph VIII, or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or things presented in said paragraph VIII; that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to taking evidence thereon, defendant admits the allegations of said paragraph VIII.

XVI.

Answering paragraph IX of plaintiff's complaint defendant alleges that he has no knowledge or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph IX; that he is without funds, except his individual and personal funds, with which to investigate, procure or present evidence concerning the matters alleged in said paragraph IX, or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon; that defendant in his individual capacity, the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said paragraph IX, or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or [53] things presented in said paragraph IX; that for such reasons and to avoid and prevent a judgment against de-

fendant for costs necessary to taking evidence thereon, defendant admits the allegations of said paragraph IX.

XVII.

Answering paragraph X of plaintiff's complaint defendant alleges that he has no knowledge or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph X; that he is without funds, except his individual and personal funds, with which to investigate, procure or present evidence concerning the matters alleged in said paragraph X, or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon; that defendant in his individual capacity, the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said paragraph X, or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or things presented in said paragraph X; that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to taking evidence thereon, defendant admits the allegations of said paragraph X.

XVIII.

Answering paragraph XI of plaintiff's complaint defendant alleges that he has no knowledge or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph XI; that he is without funds, except his individual and personal funds, with which to investi-

gate, procure or present evidence concerning the matters alleged in said paragraph XI, or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon; that defendant in his individual capacity, the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said [54] paragraph XI, or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or things presented in said paragraph XI; that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to taking evidence thereon, defendant admits the allegations of said paragraph XI.

XIX.

Answering paragraph XII of plaintiff's complaint defendant alleges that he has no knowledge or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph XII; that he is without funds, except his individual and personal funds, with which to investigate, procure or present evidence concerning the matters alleged in said paragraph XII, or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon; that defendant in his individual capacity, the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said paragraph XII, or in procuring or presenting evidence in respect thereto, or in the

adjudication or determination of the matters or things presented in said paragraph XII; that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to taking evidence thereon, defendant admits the allegations of said paragraph XII.

XX.

Answering paragraph XIII of plaintiff's complaint defendant alleges that he has no knowledge or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph XIII; that he is without funds, except his individual and personal funds, with which to investigate, procure or present evidence concerning the matters alleged in said paragraph XIII, or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon; that defendant in his individual capa- [55] city, the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said paragraph XIII, or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or things presented in said paragraph XIII; that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to taking evidence thereon, defendant admits the allegations of said paragraph XIII.

XXI.

Answering paragraph XIV of plaintiff's complaint defendant alleges that he has no knowledge

or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph XIV; that he is without funds, except his individual and personal funds, with which to investigate, procure or present evidence concerning the matters alleged in said paragraph XIV, or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon; that defendant in his individual capacity, the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said paragraph XIV, or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or things presented in said paragraph XIV; that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to taking evidence thereon, defendant admits the allegations of said paragraph XIV.

XXII.

Answering paragraph XV of plaintiff's complaint defendant denies that an actual controversy, or any controversy, has arisen or exists between the plaintiff and the defendant with respect to the validity or constitutionality of the Arizona Train-Limit Law, or with respect to the rights, duties, powers or obligations of the parties to this suit under said law, or at all; denies that [56] defendant claims or maintains that said Arizona Train-Limit Law is valid or constitutional in all respects,

or in any respect, or is applicable to or binding upon plaintiff in its railroad operations in Arizona; denies that defendant claims or maintains that, in the event of violation of said law by plaintiff, it is or will be his duty to institute or to direct the institution of proceedings to recover from plaintiff the penalties provided in said law or otherwise to enforce compliance therewith by plaintiff.

In this connection defendant alleges that in his individual capacity, the capacity in which he is here sued, the defendant has no duty whatsoever to enforce said law or to perform in connection therewith, and has no interest whatsoever in the determination of the validity or constitutionality of said Arizona Train-Limit Law; and that if, as plaintiff alleges and contends, said Arizona Train-Limit Law is unconstitutional, then neither under the Constitution nor the laws of the State of Arizona is any power vested in, nor any duty imposed upon the defendant in his official capacity to commence or prosecute, or to direct the institution or prosecution of, suits for penalties for a violation of said Arizona Train-Limit Law, or in any manner whatsoever to enforce said Arizona Train-Limit Law; in this connection defendant further alleges that the formulating of an opinion by the defendant concerning the validity or constitutionality of the said Arizona Train-Limit Law and of the duty of the defendant in his official capacity in connection therewith and in the enforcement thereof requires and will require a great amount of study and inves-

tigation into facts, information and data in connection therewith; that defendant is informed and believes and on information and belief alleges that in a proceeding in this Court (Southern Pacific Company vs. K. Berry Peterson, Attorney General of the State of Arizona, Equity No. 196, Phx.), wherein the validity or constitutionality of said Arizona Train-Limit Law was in issue but not determined, approxi- [57] mately twenty-five volumes of evidence material and relevant to facts bearing upon the question of the validity or constitutionality of said Arizona Train-Limit Law were received, in addition to numerous intricate and involved exhibits; that defendant, either in his individual or official capacity, has made no study or investigation, and has no knowledge or information concerning, the facts, data or information relevant or material to, or bearing upon the question of the validity or constitutionality of said Arizona Train-Limit Law, and has formulated no opinion or belief, and makes no contention, either as to the validity, constitutionality or unconstitutionality of said Arizona Train-Limit Law, or as to defendant's duties thereunder, or as to the application of said Arizona Train-Limit Law to plaintiff's railroad operations in Arizona; that no occasion has arisen for defendant in his official capacity to investigate the constitutionality of said Arizona Train-Limit Law because there has been no report or information furnished to defendant of any violation of said Arizona Train-Limit Law in Arizona, and defendant has no knowl-

edge or information that said law ever has been violated, and in his individual capacity defendant has no interest whatsoever in the investigation or determination of the constitutionality or unconstitutionality of the Arizona Train-Limit Law; defendant denies that the position or opinion of the defendant with regard to the constitutionality or validity of said Arizona Train-Limit Law in any way interferes with the plaintiff's operations; denies that defendant has or maintains any position, opinion or contention concerning the validity or constitutionality of said Arizona Train-Limit Law; denies that any conflicting claim exists between the plaintiff and the defendant concerning the validity or constitutionality of said Arizona Train-Limit Law; denies that any controversy, actual or otherwise, exists between the plaintiff and the defendant; denies that it is necessary, proper, or within the jurisdiction of the Court to render a declaratory judgment, or any [58] judgment herein.

XXIII.

Defendant denies that he claims or maintains that it is or will be his duty, as Attorney General or otherwise, to prosecute or sue plaintiff for each or for any violation by plaintiff of the Arizona Train-Limit Law as alleged in paragraph XVI of plaintiff's complaint.

Answering, each and every, all and singular, the allegations contained in paragraph XVI not herein specifically admitted or denied defendant alleges

that he has no knowledge or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph XVI; that he is without funds, except his individual and personal funds, with which to investigate, procure or present evidence concerning the matters alleged in said paragraph XVI, or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon; that defendant in his individual capacity, the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said paragraph XVI, or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or things presented in said paragraph XVI; that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to taking evidence thereon, defendant admits the allegations of said paragraph XVI.

XXIV.

Answering paragraph XVII of plaintiff's complaint defendant alleges that he has no knowledge or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph XVII; that he is without funds, except his individual and personal funds, with which to investigate, procure or present evidence concerning the matters alleged in said paragraph XVII, or to pay any costs which might be incurred, and [59] adjudged against him, in taking evidence thereon;

that defendant in his individual capacity, the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said paragraph XVII, or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or things presented in said paragraph XVII; that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to taking evidence thereon, defendant admits the allegations of said paragraph XVII.

Wherefore, defendant prays that plaintiff's complaint and action be dismissed for want of jurisdiction and that defendant have his costs herein expended.

CHARLES L. STROUSS,
W. E. POLLEY,
Attorneys for Defendant,
703 Heard Building,
Phoenix, Arizona.

[Endorsed]: Filed Jul. 5, 1939. [60]

[Title of District Court.]

April 1939 Term
at Phoenix

MINUTE ENTRY OF SEPTEMBER 18, 1939

(Phoenix Division)

Honorable Dave W. Ling,
United States District Judge, presiding.

[Title of Cause.]

Plaintiff's Motion for Order Appointing Special Master and Referring Cause to such Special Master and Defendant's Objection to Appointment of Special Master come on regularly for hearing this day.

Louis Whitney, Esquire, and Burton Mason, Esquire, appear as counsel for the plaintiff. Charles L. Strouss, Esquire, appears as counsel for the defendant.

Argument is now had by respective counsel, and

It is ordered that said Motion for Order Appointing Special Master and Referring Cause to such Special Master be and it is denied. [61]

[Title of District Court.]

October 1939 Term
at Phoenix

MINUTE ENTRY OF OCTOBER 23, 1939

(Phoenix Division)

Honorable Dave W. Ling,
United States District Judge, presiding.

[Title of Cause.]

It is ordered that this case be set for pre-trial conference Friday, November 3, 1939, at ten o'clock a. m., pursuant to Rule 16, and it is further ordered that this case be set for trial Tuesday, December 12, 1939, at ten o'clock a. m. [62]

[Title of District Court.]

October 1939 Term
at Phoenix

MINUTE ENTRY OF NOVEMBER 3, 1939

(Phoenix Division)

Honorable Dave W. Ling,
United States District Judge, presiding.

[Title of Cause.]

This case comes on regularly this day for pre-trial conference pursuant to Civil Rule 16.

Henley C. Booth, Esquire, Burton Mason, Esquire, Alexander B. Baker, Esquire, and Louis B. Whitney, Esquire, appear as counsel for the plain-

tiff. The defendant, Joe Conway, is present with his counsel, Charles L. Strouss, Esquire, and W. E. Polley, Esquire.

Louis L. Billar is now duly sworn to report these proceedings and pre-trial hearing is now had. [63]

[Title of District Court and Cause.]

PRE-TRIAL CONFERENCE

The Pre-Trial Conference was called on the above entitled cause by the Honorable Dave W. Ling, Judge of the United States District Court for the District of Arizona, commencing at the hour of 10 o'clock A. M. on the 3rd day of November, 1939.

The plaintiff was represented by Messrs. Alexander B. Baker and Louis B. Whitney, 703 Luhrs Tower, Phoenix, Arizona, Solicitors, and Messrs. C. W. Durbrow, Henley C. Booth and Burton Mason, 65 Market Street, San Francisco, California, of Counsel.

The defendant was represented by Messrs. Charles L. Strouss and W. E. Polley, 703 Heard Building, Phoenix, Arizona.

Thereupon the following proceedings were had:

Thereupon Louis L. Billar was duly sworn to act as official Shorthand Reporter during the proceedings. [64]

The Court: I think probably we could save some time in the trial of this case if we could learn now on the issues which are to be presented what por-

tions of the complaint are denied and which are admitted. There seems to be some question in the minds of counsel for the plaintiff whether the defendant's answer would constitute an admission or a denial of some of the allegations in the complaint. I think we might clear that up.

I notice in Paragraph 1 of the complaint, that seems to be admitted except down to line 15 on page 2.

Mr. Mason: Your Honor please, I have prepared a summary of the allegations which may save a little time in your review. I would like to present it to you and present a copy to opposing counsel. It is entitled "Plaintiff's Memorandum for Pre-Trial Conference" and, Mr. Reporter, will you show that I have handed a copy to his Honor and also a copy to Mr. Strouss.

(Thereupon a copy of document was presented to the court and to counsel, Mr. Strouss, by Mr. Mason.)

The Court: Well, I gather from this that the allegations of the complaint, then, are 3, 5, 6, 7, 8 and 15 are admitted and it would not be necessary to introduce testimony to support those allegations.

Mr. Mason: Well, I don't believe that they are admitted. [65]

The Court: Well, that is the purpose for this hearing.

Mr. Mason: As I said, as shown here on Page 9 of this memorandum, it says, "That he has no information or knowledge sufficient to form a belief

as to the truth of the matters alleged", and that statement, under Rule 8 (b) of the District Court Rules, has the effect of a denial and places the burden of proof upon the plaintiff. Now, accompanying that denial or the equivalent of a denial is the statement of lack of interest and lack of funds, a desire to avoid a trial or judgment for costs, in consequence of which the defendant says, 'and to avoid judgment for costs, he admits the allegations'. That sort of a qualified admission, to my mind, is almost the same as a denial. It emphasizes a denial for a lack of information.

Mr. Strouss: Of course, as we see it, that is not a qualified admission.

The Court: That may be true as far as the pleadings are concerned, but this is a hearing now to determine the allegations you have to prove and those you do not have to prove irrespective of the plea.

Mr. Mason: Yes. This memorandum is addressed, of course, only to the state of the issues as they appear from the pleadings and not to any modifications that may [66] appear today as a result of what the defendant or his counsel may say.

The Court: Well, then, to go back to the complaint, all of Paragraph 1, apparently, is admitted except, as I stated before, the beginning of line 15 on Page 2— "As such, under the Constitution and laws of that state, there is vested in him the exclusive power, and upon him is imposed the mandatory duty, to commence and prosecute and to di-

rect the institution and prosecution of, suits for penalties for every violation of the Arizona Train-Limit Law, the statute, the validity of which constitutes the subject-matter of the instant controversy."

Now it is true, you admit all of Paragraph 1?

Mr. Strouss: Yes, we admit that latter part involved, but in the case of a constitutional law.

Mr. Booth: Do you admit it in case the law is considered constitutional?

Mr. Strouss: Of course, that is for argument, Mr. Booth, if your statement that the law is presumed to be constitutional is a correct statement of the law.

Mr. Booth: Assuming it is a correct statement, would that be——

Mr. Strouss: No, I would not admit that he has the duty to enforce a law merely by reason—by the presumption of its constitutionality. I don't think that is the law. [67] That, however, is a legal question and not a question of fact.

Mr. Mason: Do you contend, Mr. Strouss, that the defendant could excuse a failure to enforce this law if a violation was called to his attention, by saying that in his opinion it was unconstitutional?

Mr. Strouss: I certainly do.

Mr. Mason: If he were sued upon his official bond or writ of mandate were issued against him?

Mr. Strouss: I don't think there would be any liability, is my opinion.

Mr. Mason: You take the view, then, that he can determine for himself if the law was constitutional?

Mr. Strouss: I think that is the business of the Attorney General——

The Court: What part do the courts play in this scheme?

Mr. Strouss: He might be wrong honestly. I don't think there is any liability upon his official bond. That is what Mr. Mason asked. He has the right, I think, to determine for himself whether—in the first instance whether, in his opinion, the law is constitutional or unconstitutional. Some courts may disagree with him. The court may hold the law is constitutional, but if he is acting in good faith, there is no liability on his part. [68]

Mr. Booth: Well, here is a rather phenomenal situation, if the court please, that is produced by counsel's position. Now it is perfectly apparent that in the case of a police statute, such as this; that is, because of this very statute, the determination on the constitutionality or unconstitutionality of a statute depends upon the examination of a very large mass of facts. The question of unreasonableness depends on the examination of the facts as to whether the law is productive of safety, or whether, as we claim, is the contrary, and that, in turn, is dependent upon matters and statistics of a great many other things which were developed in the first Arizona Train-Limit case and which was affirmed by the 3-judge court, or rather adopted by the 3-judge court and is on file in this court.

Now, on the question of interference with and a burden upon interstate commerce, that depends

upon examination of a great number of facts, all of which were examined in the Arizona Train-Limit case and are set forth in the Master's report, in summary, and adopted by the 3-judge court, and as to the point of extra territorial operation, that, of course, can't be determined by going down on the same line and looking over in New Mexico or California. That is the subject of production of a great mass of facts. [69]

Now, the defendant, in the face of that, takes this very peculiar position. He is the Attorney General of the state. The duty is cast upon him by the Constitution and his oath of office to enforce the laws of this state. He says that he has not made an examination of the facts, that he is unable to do so due to lack of funds, or this, that or the other reason. The law unquestionably, according to the decisions cited in our memorandum, presumes this law to be constitutional until proven otherwise by a court of competent jurisdiction, and yet, having made no such examination and apparently as an individual being unable to make it physically, and saying he is unable to have it made financially, he makes this very equivocal sort of denial, and he has not said yet anything that amounts to an out and out admission of these allegations in the answer, or to a denial of the allegations in the answer.

Now, consider for a moment our position in this case; we are being very seriously hurt financially by the continued threat of enforcement of this law. The threat hangs over us by the very existence of

the law itself and by the attitude of the Attorney General with respect to it, and he has never said he would not enforce it——

Mr. Mason: He insists, of course, he never will say that.

Mr. Booth: As far as the pleadings are concerned, he [70] does not say he will not enforce it. He does not say "You haven't anything to be afraid of, I won't enforce this law, therefore, there is no controversy". In effect, by those other allegations and by this form of denial which, in my practice I have never had occasion to see any denial of that kind, especially in an equity case or quasi-equity case where there is the question of candor and fairness on the part of the defendant, he apparently endeavors, by this form of denial, to anchor us in a position from which we can't extricate ourselves without producing the facts before the court upon which or from which a conclusion will follow that these sections of the Federal Constitution are violated.

It seems to me, without wanting to make a speech on it, it is a most unusual situation when a very substantial property-holder and one of the largest taxpayers in this State is subject to this daily expense, and the Attorney General feels that he can keep it from obtaining any judicial examination on whether it should be subjected to the expense or not, simply by saying 'he hasn't any money to make an investigation' which, it is very evident, it will require considerable money to make, and he has had years in which to do that.

The Court: Well, we have only gone as far as the first paragraph, Mr. Booth. [71]

Mr. Booth: Yes.

Mr. Strouss: Of course, one thing that your Honor will have to keep in mind in respect to what Mr. Booth has said, and that is, this case is an unusual case, in the respect that here is an effort to make an individual defend a state law. Now, it may be that this law was causing all the damage that they are asserting here, but it is not the fault of the individual and certainly he should not be called upon, or any other individual, to defend this law. That is what they are attempting to do under this action, suing Mr. Conway as an individual.

Mr. Booth: It is the fault of this individual only as Attorney General of Arizona.

Mr. Strouss: And, of course, naturally he has no comment to make on why he has not said whether he would or would not enforce the law. He has said honestly that he does not know, he hasn't made any investigation to determine whether the law is unconstitutional or not, and he would be a very foolish man if he did because, of course, the minute he does this, he, as an individual, is compelled to come in and defend the action which may result in a judgment of 30 or 40 thousand dollars against him for costs.

Mr. Mason: It can't possible be so much.

Mr. Strouss: It can't be so much under the status [72] of this action at the present time, but if the action is to be defended, there are probabili-

ties of appeal where, certainly, Mr. Conway, as an individual, should not be called upon to pay the expenses. It does not make any difference to him, as an individual, whether the law is sustained or not sustained.

Mr. Mason: Aren't we in the same position, as far as the last argument is concerned, that his individual capacity as a state officer as recited in Terace versus Thompson; Pierce versus Society of Sisters; Banton versus Belt Line; Ex-parte Young——

Mr. Strouss: An Ex-parte ruling?

Mr. Mason: Yes, Ex-parte. Mr. Strouss knows these cases better than I do.

The Court: All right, go on to Paragraph 2 of the petition. Sub-division A is denied.

Mr. Mason: May I ask opposing counsel, do you really deny, Mr. Strouss, that the suit is in the nature of an equity suit?

Mr. Strouss: Well, to be frank, I don't know whether declaratory acts under the Federal Constitution is one of equity or one of law. I have not found any decisions to determine that yet.

Mr. Mason: As I understand the discussion of the subject by a recognized authority, which is Borchard on [73] Declaratory Judgments, that a suit for declaratory judgment may be equitable in nature or it may be in the nature of a suit at law, but the determination depends upon the suit itself, and having in mind the character of this suit, would you say that it is of equitable nature, rather than legal in nature?

Mr. Strouss: Well, I don't think there is anything particular in this action——

The Court: That would probably be a legal question, anyway.

Mr. Strouss: Yes.

The Court: The portion that I can see that he objects to or denies, is the latter portion. He says: "—and presents an actual controversy between the plaintiff and the defendant as more fully appears hereafter, which may be finally adjudicated and determined as between said parties". Sub-division B is also denied.

Mr. Mason: I don't see any denial of Sub-division B, to the point that a right in controversy has a value of $3,000.00 that exists. Is it intended to deny the value?

Mr. Strouss: Well, if it is in controversy, we will admit that it exceeds $3,000.00.

Mr. Mason: Do you deny that right exists?

Mr. Strouss: I don't understand you.

Mr. Mason: Do you deny the right to operate long [74] trains in Arizona exists?

Mr. Strouss: If this law is constitutional, I presume it is. I don't know whether it does or does not until there is some determination on that question.

Mr. Mason: As I understand your last answer to be, that if the law is unconstitutional the right exists, or if the law is constitutional, the right does not exist.

Mr. Strouss: To operate a long train?

Mr. Mason: Yes.

Mr. Strouss: Yes. That is true if the law is constitutional, it prevents you from operating a freight train in excess of 70 cars, and a passenger train in excess of 14.

The Court: Paragraph C is also denied. Will you admit Paragraph D?

Mr. Baker: Paragraph 2-D, your Honor?

The Court: Yes, Paragraph 2-D.

Mr. Strouss: Yes, that is correct.

The Court: Well then, it won't be necessary to offer any evidence on that score.

Mr. Mason: Do you admit Paragraph 2-D in its entirety, Mr. Strouss?

Mr. Strouss: Yes, that is correct.

The Court: Do you deny Paragraph 2-E?

Mr. Strouss: That is correct.

The Court: All right, pass then to Paragraph 3. [75] Do you admit all of Paragraph 3?

Mr. Strouss: That is correct.

The Court: All of Paragraph 4?

Mr. Strouss: That is correct.

The Court: Also the whole of Paragraph 5?

Mr. Strouss: That is correct.

The Court: And you admit the whole of Paragraph 6?

Mr. Strouss: That is correct.

The Court: And Paragraph 7?

Mr. Strouss: That is correct.

The Court: And the whole of Paragraph 8?

Mr. Strouss: That is correct.

The Court: And 9?

Mr. Strouss: That is correct.

The Court: Also 10?

Mr. Strouss: That is correct.

The Court: And 11?

Mr. Strouss: That is correct.

The Court: Also Paragraph 12?

Mr. Strouss: That is correct.

Mr. Mason: A sentence in Paragraph 12 reads: "Said train-limit law is unconstitutional and void, as to each and all of the interstate trains of the plaintiff——". Do I understand you to admit that, Mr. Strouss?

Mr. Strouss: My answer has been given. [76]

Mr. Booth: Well, I am a little bit puzzled whether counsel means in admitting, that he construes the allegations of his answer to admit them, or that he now admits them as actual facts well pleaded?

The Court: He admits the facts pleaded at this time.

Mr. Booth: Well then, he does not stand on his answer any longer, because his answer denies them for lack of information and belief.

Mr. Mason: Every one that has been referred to now, except Paragraph 4 and the Paragraphs 1 and 2 which we discussed at first. Paragraph 4 is only a text of the train-limit law which we admitted in the answer. These others are all denied for lack of information and belief, coupled, I believe, with the equivocal admission on account that he desire to avoid expenditure.

The Court: Well, they are admitted now; I say, they are admitted now.

Mr. Mason: Then the answer, the paragraph in the answer with reference to these particular paragraphs that were admitted by Mr. Strouss orally just now, those paragraphs or things are withdrawn or amended to that extent?

Mr. Strouss: No, they are not amended to that extent. They are admitted, those paragraphs referred to, for the purpose of trial and eliminates a necessity for presenting [77] evidence.

The Court: Now, how far did we get?

Mr. Booth: I hope the court will pardon my insistence, but I'd like to understand whether this is equivalent, for example, to a defendant making a proper denial, and unequivocal denial of the allegations in the answer, and then when the case is called for trial, not a pre-trial, but the actual trial, when the trial is about to begin, the defendant says, "For the purposes of this trial, I will admit this allegation in the answer denying Paragraph No. 3", we will say, of the answer. Notwithstanding the averment, he will say, "I will admit the allegations in the complaint, say, Paragraph 3, notwithstanding my denial of this allegation in the answer". Is that the process we are going through now, or is this "That is correct" in answer to the court's questions just a fall off the back stairs and we relying again on what I call "left-handed denials on the answer"? I'd like to know where we stand on this in the production of testimony.

The Court: Well, it won't be necessary to introduce any testimony under counsel's statement. He admits this allegation. It is not necessary to offer any proof. The purpose of this pre-trial hearing is to save all this time in court. Those allegations which are admitted as true, you don't have to prove.

[78]

Mr. Baker: We already reached Paragraph 12. As I understand, you admit the allegations contained in Paragraph 12?

Mr. Strouss: That is correct.

Mr. Whitney: And those equivocal admissions of all the allegations?

The Court: Why, certainly. That is what these hearings are all for. Paragraph 13. The allegations of that paragraph are admitted. No proof will be necessary on that, on those allegations.

Mr. Mason: Of course, Paragraphs 12 and 13 which the court has now reached are allegations on conclusions of law, rather than matters of fact?

The Court: Well, that is true in a good many instances.

Mr. Mason: Yes.

Mr. Strouss: My answer as to the court's question is, yes, that is correct.

Mr. Mason: I take it, then, Mr. Strouss, that the defendant admits Paragraphs 12 and 13 as statements of law, as well as statements of fact?

Mr. Strouss: Well, you can take it that way. I am admitting the allegations of those two paragraphs.

The Court: Also Paragraph 14 is admitted?

Mr. Strouss: That is correct. [79]

The Court: Paragraph 15 is denied in toto?

Mr. Booth: Just a moment. The second paragraph—paragraph 15, beginning on line 29 of Page 29 of the plaintiff's complaint, and the succeeding paragraphs—no, the second paragraph beginning on line 29 of page 29 and the third paragraph beginning on line 8 of Page 30 has nothing to do with the controversy in the case as I read it. In other words, if a denial stands, we will have to prove that we could and would at once begin, and hereafter continue to operate a substantial number of freight and passenger trains, and so forth. We would also have to prove the allegation beginning on line 8 of Page 30, that we are presently unwilling and unable to undertake such long train operations, and so on.

The Court: If you have to prove that, you can do it in about 5 minutes.

Mr. Baker: Paragraph 15, you deny, is that correct?

Mr. Strouss: Yes.

Mr. Baker: He says he will require proof thereof.

Mr. Strouss: I don't remember the allegation that Mr. Booth referred to. I would not want to now, without reading the paragraph a little more carefully, say I will admit or deny it more than I have in the answer.

Mr. Baker: That is all right, Mr. Strouss. I just want to be sure you are denying all the allegations in that [80] paragraph.

The Court: All right, Paragraph 16?

Mr. Strouss: Well, if the court please, I want to correct something there. If there is any allegation which I have omitted answering in my answer, of course, under the Rules of Pleading and the Rules of the Court, those allegations stand admitted. I don't want, by Mr. Baker's statement, to be put in the position of having said I denied something which I didn't deny. What I deny is set forth in my answer. Now, if we want to stop and analyze that section——

The Court: Well, you probably admit that, the part that Mr. Booth referred to. Have you got a copy of the petition there? If so, beginning with line 29—"If it were not for said law and the position and opinion with regard to the constitutionality and validity thereof maintained by defendant, as aforesaid, plaintiff could and would at once begin and hereafter continue to operate a substantial number of its freight and passenger trains—", and so forth. I think that is to be conceded by anyone.

Mr. Strouss: Yes, we will admit that. Well, now, except this, that if it were not for the difference in opinion in regard to the constitutionality, we don't admit their failure to operate trains is due to the opinion of the defendant as to the constitutionality or unconstitutionality [81] of the law. We deny that the defendant has any opinion as to the consti-

tutionality or unconstitutionality of the law, so there is no admission that the failure to operate trains is due to his opinion as to the constitutionality or unconstitutionality of the law.

The Court: Well then, you might say the lack of opinion, if it were not for his lack of opinion.

Mr. Strouss: Well, if they want to allege it that way, why that is—but except as to that particular part of the allegation, we admit the allegation. We don't admit the failure to operate is due to any opinion of the Attorney General or the defendant.

Mr. Mason: You do admit, Mr. Strouss, that the failure to operate is due to the law, because we allege if it were not for the law the plaintiff would begin at once to operate long trains.

Mr. Strouss: Well, I assume that is true and so admit it.

Mr. Mason: And you admit that we would thereby effect increased economy and efficiency and greater safety in operations by such long trains?

Mr. Strouss: You allege that is true, and we assume it is. We admit it.

Mr. Mason: Well, coupling it with the preceding, we say that if it were not for the law, we could commence [82] long train operations and it reads this, that we "would thereby and thereupon at once begin and thereafter continue to effect the increased economy and efficiency and the greater safety of operation which, as heretofore set forth in detail, are and would be attendant upon and caused by such long-train operation".

Mr. Strouss: Yes, that is true.

The Court: Well then, the other paragraph referred to by Mr. Booth, beginning on line 8 of Page 30: "Plaintiff is presently unwilling and unable to undertake such long-train operations within—", and so forth. In the absence of final determination, you will admit that too, will you?

Mr. Strouss: Yes, I will admit that—wait until I read it so I will see there is nothing in here that says it is due to the opinion of the——

The Court: Do you have a copy?

Mr. Strouss: Yes, I have a copy.

(Thereupon the document was examined by Mr. Strouss.)

Mr. Strouss: Yes, I will admit that. However, not in any way do we admit that it is due to any opinion of the defendant..

The Court: 16, the whole of 16 is admitted?

Mr. Strouss: Is admitted, yes.

The Court: And also the whole of 17? [83]

Mr. Strouss: That is true.

The Court: Well, apparently that does not leave much to prove.

Mr. Booth: Mr. Whitney calls my attention to Rule 16 of the Rules of Civil Procedure which, after providing for the direction by the court for the attorneys to appear before it for a pre-trial conference, provides in the last paragraph that thereupon the court shall make an order, and so forth, and I assume that that will be done.

The Court: Well, I will ask the reporter to write up the portions of the complaint that are admitted and it will be filed as a stipulation in the case. It will be unnecessary to offer any proof on any of those admitted matters.

Mr. Booth: It says, "The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties——".

Mr. Baker: Your Honor will furnish a copy of the order made?

The Court: Yes.

Mr. Strouss: That order will be issued and made in accordance with the admissions made in the pre-trial procedure conference?

The Court: Yes. Anything else, gentlemen? [84]

(No response.)

(Thereupon the pre-trial hearing was ended.)

I, hereby certify, that the proceedings had and evidence given upon the hearing of this Pre-trial Conference is contained fully and accurately in the shorthand notes taken by me of said hearing, and that the foregoing 21 typewritten pages contain a full, true and accurate transcript of the same.

(Sgn.) LOUIS L. BILLAR,
Official Shorthand Reporter.

[Endorsed]: Filed Nov. 6, 1939. [85]

[Title of District Court and Cause.]

ORDER

At a Pre-Trial Conference had on November 3d, 1939, in the above entitled cause, the following admissions of fact were made by counsel for defendant:

I.

The allegations set forth in the following paragraphs of the complaint were admitted as true: Paragraphs I, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XVI and XVII.

II.

Paragraphs II(a), (c) and (e) were denied. In reference to the allegations of II(b), while defendant's counsel refused to admit that a controversy exists between the parties, he stated that if it were determined such controversy does exist, in that event, he would admit the matter in controversy to be in excess of $3,000.00.

III.

Defendant denied that portion of page 29, paragraph XV, beginning at line 13 to and including line 28 on said page. Defendant admitted that portion of paragraph XV, beginning at line 29, page 29, to and including line 7, page 30, except the following portion of said paragraph on page 29, lines 29, 30 and 31, reading as follows: "And the position and opinion with regard to the constitutionality and validity thereof maintained by defendant". De-

fendant admitted that portion of paragraph XV, [86] beginning line 8, page 30 to and including line 16 on said page. Defendant denied that portion of paragraph XV beginning on line 17, page 30 to and including line 24 on said page.

At the trial of said cause, plaintiff will not be required to offer proof in support of any of the admitted allegations of the complaint.

Dated: December 1st, 1939.

DAVE W. LING,

Judge.

[Endorsed]: Filed Dec. 1, 1939. [87]

[Title of District Court and Cause.]

MOTION TO AMEND ORDER

Comes now the defendant and moves the Court that the Order entered herein on December 1, 1939, following the Pre-Trial Procedure, be amended to read as follows:

1. Paragraph I of said order be amended to read:

> "The allegation set forth in the following paragraphs of the complaint were admitted as true: Paragraphs I(a), II(d), III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XVII.

2. Insert following paragraph I of the Order the following:

"I-A

"Defendant admitted the allegation contained in paragraph I(b) beginning with line 11, page 2, and ending with line 15, page 2, reading as follows:

"'(b) Defendant, Joe Conway, is sued as an individual, and not in his official capacity. Said defendant is a citizen of the State of Arizona, residing in the City of Phoenix, County of Maricopa, in said State, and is the duly elected, qualified and acting Attorney General of the State of Arizona.'

"Defendant denied the allegation contained in paragraph I(b) beginning with line 15, page 2, and ending with line 21, page 2, reading as follows:

"'As such, under the Constitution and laws of that state, there is vested in him the exclusive power, and upon him is imposed the mandatory duty, to commence and prosecute and to direct the institution and prosecution of, suits for penalties for every violation of the Arizona Train-Limit Law, the statute the validity of which constitutes the subject-matter of the instant controversy.'"

[88]

3. Insert following paragraph III of the Order the following:

"IV.

"Defendant admitted the allegations of paragraph XVI except the allegation appearing in lines 25, 26 and 27, page 31, reading as follows:

"'* * * said defendant claims and maintains that it is and will be his duty, as Attorney General, to prosecute and sue plaintiff for each and every violation of said Act which it may commit.'

which allegation defendant denied."

CHARLES L. STROUSS,
W. E. POLLEY,
Attorneys for Defendant,
703 Heard Building,
Phoenix, Arizona.

[Endorsed]: Filed Dec. 12, 1939. [89]

[Title of District Court.]

October 1939 Term
at Phoenix

MINUTE ENTRY OF DECEMBER 12, 1939

(Phoenix Division)

Honorable Dave W. Ling,
United States District Judge, presiding.

[Title of Cause.]

This case comes on regularly for trial this day before the Court sitting without a jury.

Henley C. Booth, Esquire, Burton Mason, Esquire, and Louis Whitney, Esquire, appear as counsel for the plaintiff. The defendant, Joe Conway, is present with his counsel Charles Strouss, Esquire, and W. E. Polley, Esquire.

Both sides announce ready for trial.

Henry Larson is present as reporter.

Charles Strouss, Esquire, now files Motion to Amend Order of December 1, 1939, following pretrial conference.

Argument is now had by respective counsel, and

It is ordered that said Motion to Amend Order of December 1, 1939, be and it is granted.

Plaintiff's Case:

The following plaintiff's exhibits are now admitted in evidence:

1. Affidavit of Joe Conway.
2. Notice of taking deposition.

On motion of Burton Mason, Esquire,

It is ordered that the Clerk open the deposition of Joe Conway.

Plaintiff's exhibit 3, Deposition of Joe Conway, is now admitted in evidence.

Whereupon, the plaintiff rests. [90]

And the defendant rests.

Both sides rest.

Defendant now renews motion to dismiss, heretofore filed.

Arguments is had by respective counsel.

On motion of Burton Mason, Esquire,

It is ordered that the record made at the pretrial conference herein be considered as having been made a part of the trial proceedings on this date.

Whereupon, it is ordered that this case and said Motion to Dismiss be submitted and by the Court taken under advisement.

It is further ordered that reporter Henry Larson be allowed to withdraw plaintiff's exhibits 2 and 3 for use in preparing transcript, upon his receipting therefor. [91]

[Title of District Court.]

October 1939 Term
at Phoenix

MINUTE ENTRY OF FRIDAY, FEBRUARY 9, 1940

(Phoenix Division)
Honorable Dave W. Ling,
United States District Judge, Presiding

[Title of Cause.]

This case having been submitted and by the Court taken under advisement,

It is ordered that this case be and it is dismissed. [92]

[Title of District Court and Cause.]

DRAFT OF FINDINGS OF FACT AND CONCLUSIONS OF LAW, SUBMITTED BY DEFT.

Findings of Fact:

1. That the defendant, Joe Conway, is sued in his individual capacity.

2. That in his individual capacity the defendant has no legal interest in the determination of the

constitutionality or unconstitutionality of the Arizona Train Limit Law (Section 647, Revised Code of Arizona, 1928).

3. That the defendant has neither formulated nor expressed an opinion that the Arizona Train Limit Law (Section 647, Revised Code of Arizona, 1928) is constitutional.

4. That the defendant has not threatened to enforce the Arizona Train Limit Law (Section 647, Revised Code of Arizona, 1928).

5. That the defendant has taken no action toward enforcing the Arizona Train Limit Law (Section 647, Revised Code of Arizona, 1928).

Conclusions of Law:

1. That the defendant, in the capacity in which he is sued, has no legal interest which will be affected by a declaratory judgment determining the constitutionality or unconstitutionality of the Arizona Train Limit Law (Section 647, Revised Code of Arizona, 1928). [93]

2. That no case or controversy is presented within the judicial power of the United States courts.

Dated February ....., 1940.

.....,

District Judge.

[Endorsed]: Filed Feb. 14, 1940. [94]

[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED AMENDMENTS AND ADDITIONS TO "DRAFT OF FINDINGS OF FACT AND CONCLUSIONS OF LAW" PRESENTED BY DEFENDANT.

Now comes the plaintiff, and excepts and objects to the Findings of Fact and Conclusions of law set forth and proposed in the "Draft of Findings of Fact and Conclusions of Law" served and filed by defendant under date of February 13, 1940, and to each and all of said findings of fact and conclusions of law, upon the ground that the same are, and each of them is, erroneous, insufficient, improper and defective, in that they do not, either severally or collectively, present the material and ultimate facts disclosed by the record, or present the true, proper and correct conclusions of law predicated upon the material and ultimate facts so disclosed; and plaintiff, therefore, proposes and requests that the Court make and adopt the following special findings of fact and conclusions of law in lieu of those proposed and requested by defendant, as aforesaid:

This cause came on regularly for trial before the Court on December 12, 1939, Honorable Dave W. Ling, United States District Judge, presiding and sitting without a jury. [95] Plaintiff was represented by its attorneys, Alexander B. Baker, Esq., Louis B. Whitney, Esq., Henley C. Booth, Esq., and Burton Mason, Esq. Defendant appeared in person and was also represented by his attorneys, Charles

L. Strouss, Esq. and W. E. Polley, Esq. Evidence was duly offered by and on behalf of the plaintiff, and received by the Court. Defendant offered no evidence, but upon the conclusion of plaintiff's testimony renewed his motion to dismiss the complaint for lack of jurisdiction, which motion had theretofore been presented by him to the Court on May 5, 1939, and by the Court denied, by order dated June 26, 1939. Said motion was thereupon argued by counsel for the respective parties, and the cause duly submitted for decision.

Now, therefore, having duly considered all of the evidence, and the admissions of the defendant, and the arguments of counsel, and being duly advised, the Court does hereby, pursuant to Rule 52 of the Federal Rules of Civil Procedure, make and adopt the following as its Special Findings of Fact and Conclusions of Law in this cause:

SPECIAL FINDINGS OF FACT

I.

Each and all of the allegations of the following paragraphs of the complaint herein have been and are admitted and conceded by the defendant to be true and correct, and are, therefore, hereby found to be true and correct, to-wit: Paragraphs I(a), II(d), III, IV, V, VI, VII, VIII, IX, X, XI and XVII.

II.

Defendant, Joe Conway, is a citizen of Arizona, residing in the City of Phoenix, Maricopa County,

in said state, and is the duly elected, qualified and acting Attorney General of Arizona. The constitution and laws of Arizona vest in the Attorney General of that state the exclusive power and duty [96] to commence and prosecute or direct the prosecution of suits or penalties for every violation of the Arizona Train Limit Law (Section 647, Revised Code of Arizona, 1928).

III.

It is the statutory duty of the Attorney General of Arizona, expressly imposed upon him by Section 3 of said Train Limit Law, to enforce the provisions thereof if and when the same are violated. Defendant admits that it now is and in future will continue to be his official duty to prosecute, in accordance with the terms of said law, for each and every violation thereof; and declares further that he never has stated, and never will state, that having in mind his official oath of office as Attorney General, he will refuse to enforce said law, or will refrain from efforts to enforce it.

IV.

In handling the interstate freight traffic moving over its lines across the State of Arizona, plaintiff operates daily in each direction between its freight terminals at Yuma, Arizona, and Gila, Arizona, and between its freight terminals at Gila and Tucson, Arizona, and between its freight terminals at Tucson and Lordsburg, New Mexico, a substantial number of through interstate freight trains, all of which

move over the line heretofore described as the Yuma-Maricopa-Lordsburg Line. The number of such trains so operated each day varies according to the demands of traffic and ranges from approximately 75 trains per month on the average, in each direction between Yuma and Gila, and 75 trains per month in each direction between Gila and Tucson, and 90 trains per month in each direction between Tucson and Lordsburg, during the month of November, to 180 trains per month in each direction between Yuma and Gila, and 180 trains per month in each direction between Gila and [97] Tucson, and 200 trains per month in each direction between Tucson and Lordsburg, during the month of June; which said months of November and June represent the months during the year when such interstate traffic across Arizona is lightest and heaviest, respectively.

If plaintiff were to disregard the provisions of the Arizona Train-Limit Law, and were to attempt to operate each of its aforesaid freight trains within or across the State of Arizona with more than 70 cars each, exclusive of caboose, it would thereby become subject to prosecution for the recovery of the severe penalties provided by Section 3 of said Train-Limit Law, which said Section provides a penalty of not less than $100.00 nor more than $1,000.00 for each such violation. As heretofore set forth, defendant admits that it now is, and in future will continue to be, his official duty to prosecute, in accordance with the terms of said law, for

each and every violation thereof which may occur. Plaintiff thus would become liable for penalties, in the event the defendant should institute such prosecutions, as directed and required by said Section 3, which, in the event said law should be sustained in said prosecutions, would range, on the average, from $1,600.00 to *$1,600.00* per day during the period of lightest traffic, and from $3,700.00 to $37,000.00 per day during the period of heaviest traffic; and said penalties would be and will be cumulative, and may or might be recovered by said defendant, in a single prosecution, or in a series of prosecutions instituted for that purpose, unless said law be declared invalid and unconstitutional by final judgment as herein prayed for. Said penalties would be additional to any penalties which might be incurred by the operation of freight trains of more than 70 cars, exclusive of caboose, upon the Wellton-Phoenix-Picacho or Tucson-Douglas main lines, heretofore described, or upon any [98] of the branch lines in Arizona, or of passenger trains of more than 14 cars upon any part of the plaintiff's lines in Arizona.

If, on the other hand, plaintiff should continue to comply with said law, and should continue to operate all of its freight trains upon its lines within the State of Arizona, and the adjacent districts in which the law now has extraterritorial effect, with not more than 70 freight or other cars, exclusive of caboose, and were to continue to operate all of its passenger trains within Arizona and said adja-

cent districts with not more than 14 cars each, the added expense thus imposed upon plaintiff, solely as the result of said compliance, would be and will continue to be, as heretofore more fully alleged, not less than $300,000.00 per year, or, on the average, not less than approximately $822.00 per day, all of which such added expense is and will be continuous and irreparable.

V.

An actual controversy has arisen and now exists, between the plaintiff and the defendant, with regard to their respective rights, duties, powers, and obligations under and pursuant to said Train Limit Law: in that plaintiff, on the one hand, claims and maintains that said law is wholly invalid and unconstitutional as to plaintiff's interstate trains, and that consequently no power or duty to prosecute or sue plaintiff for violation thereof exists or is vested in defendant, either as Attorney General of Arizona, or as an individual purporting to act under color of that office; whereas defendant, on the other hand, admits that by its terms said law imposes upon him, as said Attorney General, the power and duty of prosecution for each and every violation thereof, and also admits, as aforesaid, that it is and will be his official duty to commence and continue or direct such prosecutions; and has further declared [99] that he, the defendant, has never said and never will say that, having in mind his oath of office as said Attorney General, he will refuse, or refrain from effort, to enforce said law.

If it were not for said law, plaintiff could and would at once begin and hereafter continue to operate a substantial number of its freight and passenger trains into, within, through, and across Arizona without regard to the restrictions and limitations imposed by said law; and would thereby and thereupon at once begin and thereafter continue to effect the increased economy and efficiency and the greater safety of operation which, as heretofore set forth in detail, are and would be attendant upon and caused by such long train operation. Plaintiff is presently unwilling and unable to undertake such long-train operations within, through and across Arizona, in the absence of a final determination and declaration that said law is invalid and unconstitutional as applied to its operations, because of the heavy cumulative penalties which, as hereinafter described, would shortly accrue if such a course were followed, and the law should be sustained in prosecutions instituted by or at the direction of the defendant for the purpose of enforcing said law and recovering the penalties therein provided.

CONCLUSIONS OF LAW

I.

The matter in controversy in this case, exclusive of interest and costs, greatly exceeds the sum or value of $3,000.00; and this case is a suit of a civil nature, for declaratory relief, between citizens of different states, and arises under the Constitution and Laws of the United States; therefore this

Court has jurisdiction over the subject matter [100] of the case, and of the parties thereto.

II.

Under the Constitution and laws of Arizona, and particularly by the express terms of the Arizona Train Limit Law, power and duty are conferred upon and vested in the duly elected, qualified, and acting Attorney General of Arizona, to enforce said law by commencing and prosecuting or directing the prosecution of suits for penalties for every violation of said Train Limit Law; and said defendant admits and asserts that it is and will be his official duty, in his capacity as such Attorney General, to prosecute and sue plaintiff for each and every violation of said law which it may commit; and said defendant has further stated and declared that he has never said and never will say that, having in mind his official oath, he will refuse to enforce said law, or refrain from effort to enforce it.

The damage and injury which plaintiff daily sustains and will continue to sustain by reason of said Train Limit Law, and the exercise of the aforesaid power and duty of enforcement claimed and asserted by defendant to exist and to be vested in himself, are and will be great and irreparable; but by reason of the provisions of said law, plaintiff cannot safely disregard the same, and await or invite prosecutions thereunder, for the purpose of obtaining a judicial determination whether said law is valid and binding and the claimed power and

duty of prosecution thereunder exist, without being subjected to the severe and cumulative penalties which would and will shortly accrue if such a course were followed, and said law were sustained in prosecutions brought or directed by the defendant pursuant to the provisions thereof. [101]

Plaintiff, as a citizen and resident of the State of Kentucky, has no plain, speedy or adequate remedy at law in this or any other Court of the United States. Irrespective of its residence or citizenship in a state other than Arizona, plaintiff has no plain, speedy or adequate remedy at law in any court of the State of Arizona or of any other jurisdiction.

III.

Each and all of the conclusions of law set forth in Paragraphs XII, XIII and XIV of the complaint are admitted and conceded by the defendant to be true and correct in every respect; and the same, and each of them, are hereby adopted by the Court as part of its conclusions of law herein.

IV.

Plaintiff is entitled to a judgment and decree as prayed for in its Bill of Complaint, declaring that said Train Limit Law is arbitrary and unreasonable in and of itself, and is void and unconstitutional in the respects and for the reasons set forth in Paragraphs XII, XIII and XIV of plaintiff's complaint, and is therefore invalid and unenforcible as

to plaintiff and each and all of plaintiff's railroad operations in the State of Arizona; and declaring further that defendant has no power or duty, lawfully or constitutionally imposed upon or vested in him, either in his capacity as Attorney General or otherwise, to enforce said Train Limit Law or to subject plaintiff to suits or prosecutions for penalties for any violation thereof, which said plaintiff may commit in the course of any of its aforesaid railroad operations.

Dated this.....day of February, 1940.

.....

Judge of the United States District
Court for the District of Arizona

[102]

Respectfuly submitted,

ALEXANDER B. BAKER
LOUIS B. WHITNEY
Solicitors for Plaintiff
703 Luhrs Tower
Phoenix, Arizona

C. W. DURBROW
HENLEY C. BOOTH
BURTON MASON
Of Counsel
65 Market Street
San Francisco, California

[Endorsed]: Filed Feb. 14, 1940. [103]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial before the Court on December 12, 1939, Honorable Dave W. Ling, United States District Judge, presiding and sitting without a jury. Plaintiff was represented by its attorneys, Alexander B. Baker, Esq., Louis B. Whitney, Esq., Henley C. Booth, Esq. and Burton Mason, Esq. Defendant appeared in person and was also represented by his attorneys, Charles L. Strouss, Esq. and W. E. Polley, Esq. Evidence was duly offered by and on behalf of the plaintiff, and received by the Court. Defendant offered no evidence, but upon the conclusion of plaintiff's testimony renewed his motion to dismiss the complaint for lack of jurisdiction, which motion had theretofore been presented by him to the Court on May 5, 1939, and by the Court denied, by order dated June 26, 1939. Said motion was thereupon argued by counsel for the respective parties, and the cause duly submitted for decision.

Now, therefore, having duly considered all of the evidence, and the admissions of the defendant, and the arguments of counsel, and being duly advised, the Court [104] does hereby, pursuant to Rule 52 of the Federal Rules of Civil Procedure, make and adopt the following as its Special Findings of Fact and Conclusions of Law in this cause:

SPECIAL FINDINGS OF FACT

I.

Defendant, Joe Conway, who is sued in his individual capacity, is a citizen of Arizona, residing in the City of Phoenix, Maricopa County, in said state, and is the duly elected, qualified and acting Attorney General of Arizona. The constitution and laws of Arizona vest in the Attorney General of that state the exclusive power and duty to commence and prosecute or direct the prosecution of suits or penalties for every violation of the Arizona Train Limit Law (Section 647, Revised Code of Arizona, 1928).

II.

That the defendant has not threatened to enforce the Arizona Train Limit Law (Section 647, Revised Code of Arizona, 1928).

III.

That the defendant has taken no action toward enforcing the Arizona Train Limit Law (Section 647, Revised Code of Arizona, 1928).

IV.

Section 647, Revised Code of Arizona, 1928, reads in part as follows: "And such penalty shall be recovered, and suits therefor brought by the Attorney General, or under his direction, in the name of the State of Arizona, in any county through which such railway may be run or operated, provided, however, that this act shall not apply in cases of engine failures between terminals." [105]

V.

In handling the interstate freight traffic moving over its lines across the State of Arizona, plaintiff operates daily in each direction between its freight terminals at Yuma, Arizona, and Gila, Arizona, and between its freight terminals at Gila and Tucson, Arizona, and between its freight terminals at Tucson and Lordsburg, New Mexico, a substantial number of through interstate freight trains, all of which move over the line heretofore described as the Yuma-Maricopa-Lordsburg Line. The number of such trains so operated each day varies according to the demands of traffic and ranges from approximately 75 trains per month on the average, in each direction between Yuma and Gila, and 75 trains per month in each direction between Gila and Tucson, and 90 trains per month in each direction between Tucson and Lordsburg, during the month of November, to 180 trains per month in each direction between Yuma and Gila, and 180 trains per month in each direction between Gila and Tucson, and 200 trains per month in each direction between Tucson and Lordsburg, during the month of June; which said months of November and June represent the months during the year when such interstate traffic across Arizona is lightest and heaviest, respectively.

If plaintiff were to disregard the provisions of the Arizona Train-Limit Law, and were to attempt to operate each of its aforesaid freight trains within or across the State of Arizona with more

than 70 cars each, exclusive of caboose, it would thereby become subject to prosecution for the recovery of the severe penalties provided by Section 3 of said Train-Limit Law, which said Section provides a penalty of not less than $100.00 nor more than $1,000.00 for each such violation. Plaintiff thus would become [106] liable for penalties, in the event the defendant should institute such prosecutions, as directed and required by said Section 3, which, in the event said law should be sustained in said prosecutions, would range, on the average, from $1,600.00 to $16,000.00 per day during the period of lightest traffic, and from $3,700.00 to $37,000.00 per day during the period of heaviest traffic; and said penalties would be and will be cumulative, and may or might be recovered by said defendant, in a single prosecution, or in a series of prosecutions instituted for that purpose, unless said law be declared invalid and unconstitutional by final judgment as herein prayed for. Said penalties would be additional to any penalties which might be incurred by the operation of freight trains of more than 70 cars, exclusive of caboose, upon the Wellton-Phoenix-Picacho or Tucson-Douglas main lines, heretofore described, or upon any of the branch lines in Arizona, or of passenger trains of more than 14 cars upon any part of the plaintiff's lines in Arizona.

If, on the other hand, plaintiff should continue to comply with said law, and should continue to operate all of its freight trains upon its lines

within the State of Arizona, and the adjacent districts in which the law now has extraterritorial effect, with not more than 70 freight or other cars, exclusive of caboose, and were to continue to operate all of its passenger trains within Arizona and said adjacent districts with not more than 14 cars each, the added expense thus imposed upon plaintiff, solely as the result of said compliance, would be and will continue to be, as heretofore more fully alleged, not less than $300,000.00 per year, or, on the average, not less than approximately $822.00 per day, all of which such added expense is and will [107] be continuous and irreparable.

VI.

If it were not for said law, plaintiff could and would at once begin and hereafter continue to operate a substantial number of its freight and passenger trains into, within, through, and across Arizona without regard to the restrictions and limitations imposed by said law; and would thereby and thereupon at once begin and thereafter continue to effect the increased economy and efficiency and the greater safety of operation which, as set forth in detail in the complaint, are and would be attendant upon and caused by such long train operation. Plaintiff is presently unwilling and unable to undertake such long-train operations within, through and across Arizona, in the absence of a final determination and declaration that said law is invalid and unconstitutional as applied to its operations, because of the

heavy cumulative penalties which, as hereinafter described, would shortly accrue if such a course were followed, and the law should be sustained in prosecutions instituted by or at the direction of the defendant for the purpose of enforcing said law and recovering the penalties therein provided.

VII.

Each and all of the allegations of the following paragraphs of the complaint herein have been and are admitted and conceded by the defendant to be true and correct, and are, therefore, hereby found to be true and correct, to-wit: Paragraphs I (a), II (d), III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XVII. [108]

CONCLUSIONS OF LAW

I.

The matter in controversy in this case, exclusive of interest and costs, greatly exceeds the sum or value of $3,000.00; and this case is a suit of civil nature, for declaratory relief, between citizens of different states.

II.

That no case or controversy is presented within the judicial power of the United States courts.

Dated February 14, 1940.

DAVE W. LING,
District Judge.

[Endorsed]: Filed Feb. 14, 1940. [109]

In the District Court of the United States
for the District of Arizona

No. Civ. 31—Phoenix

SOUTHERN PACIFIC COMPANY,
(a corporation),

Plaintiff,

vs.

JOE CONWAY,

Defendant.

JUDGMENT

This cause came on to be heard by the Court at this term, and evidence was received, and the cause argued by counsel and duly submitted; and the Court having fully considered the pleadings, the evidence and the arguments of counsel, and Findings of Fact and Conclusions of Law having been made, adopted and filed by the Court; and the Court having found that no case or controversy is presented within the judicial power of the United States Court;

It is now ordered, adjudged and decreed in accordance with said Findings and Conclusions, that the plaintiff's complaint and action be and is hereby dismissed; and that defendant go hence without day.

Done in open court this 14th day of February, 1940.

DAVE W. LING,
United States District Judge.

Approved as to Form this 14th day of February, 1940.

ALEXANDER B. BAKER,
LOUIS B. WHITNEY,
Solicitors for Plaintiff,
703 Luhrs Tower,
Phoenix, Arizona.

[Endorsed]: Filed Feb. 14, 1940. [110]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Southern Pacific Company, a corporation, the above named plaintiff, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment rendered by the District Court of the United States in and for the District of Arizona in the above named and numbered cause, under date of February 14, 1940, and from all of said judgment.

Dated this 15th day of February, 1940.

ALEXANDER B. BAKER,
LOUIS B. WHITNEY,
Solicitors for Plaintiff,
703 Luhrs Tower,
Phoenix, Arizona.
C. W. DURBROW,
HENLEY C. BOOTH,
BURTON MASON,
of Counsel,
65 Market Street,
San Francisco, California.

[Endorsed]: Filed Feb. 15, 1940. [111]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents:

That we, Southern Pacific Company, a corporation duly organized and existing under the laws of the State of Kentucky, as Principal, and Saint Paul Mercury Indemnity Company, a corporation organized and existing under the laws of the State of Delaware and authorized to transact a surety business in the State of Arizona, as Surety, are duly held and firmly bound, jointly and severally, unto Joe Conway, in the full and just sum of Two Hundred Fifty Dollars ($250.00), to be paid to the said Joe Conway, his heirs, executors, administrators, successors and assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Duly executed and sealed with our seals this 15th day of February, 1940.

Whereas, lately, at a trial held before the District Court of the United States in and for the District of Arizona, in a suit pending in said Court between said Southern Pacific Company, a corporation, plaintiff, and Joe Conway, defendant, a judgment was rendered against the said plaintiff dismissing said suit for want of jurisdiction, and said plaintiff intends [112] and proposes to appeal from the said judgment, and has this day duly filed, concurrently with this Bond, a Notice of Appeal from said judgment:

Now, therefore, the condition of the above obligation is such that if the said Southern Pacific Company, a corporation, plaintiff, shall prosecute said appeal to effect and pay all costs if the appeal be dismissed or the judgment affirmed, or such costs as the appellate court may award if the judgment be modified, then the above obligation to be void, otherwise to remain in full force and effect.

SOUTHERN PACIFIC COMPANY,
a corporation,
By ALEXANDER B. BAKER,
Its Attorney.

[Seal] SAINT PAUL MERCURY
INDEMNITY COMPANY,
a corporation.
By G. H. MYERS,
Its Attorney-in-Fact.

[Endorsed]: Filed Feb. 15, 1940. [113]

[Title of District Court and Cause.]

MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes now the defendant and moves the Court to amend the Findings of Fact and Conclusions of Law, signed by the Court and filed herein, in the following particulars:

1. By striking from paragraph V of the Findings of Fact (lines 2 and 3 of page 4 of Findings of Fact and Conclusions of Law) the words and figures "as directed and required by said Section 3".

2. By striking the whole of paragraph I of the Conclusions of Law (lines 3 to 6, inclusive, page 6 of Findings of Fact and Conclusions of Law), which paragraph I is in words and figures as follows:

> "The matter in controversy in this case, exclusive of interest and costs, greatly exceeds the sum or value of $3,000.00; and this case is a suit of a civil nature, for declaratory relief, between citizens of different states."

CHARLES L. STROUSS,
W. E. POLLEY,
Attorneys for Defendant,
703 Heard Building,
Phoenix, Arizona.

[Endorsed]: Filed Feb. 16, 1940. [114]

[Title of District Court.]

October 1939 Term
at Phoenix

MINUTE ENTRY OF FRIDAY,
FEBRUARY 23, 1940
(Phoenix Division)

Honorable Dave W. Ling,
United States District Judge, presiding.

[Title of Cause.]

Defendant's Motion to Amend Findings of Fact and Conclusions of Law having been submitted and by the Court taken under advisement,

It is ordered that said Motion to Amend Findings of Fact and Conclusions of Law be and it is denied. [115]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Southern Pacific Company, a corporation, the above named plaintiff, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment rendered by the District Court of the United States in and for the District of Arizona in the above named and numbered cause, under date of February 14, 1940, and from all of said judgment.

Dated this 2nd day of March, 1940.

ALEXANDER B. BAKER,
LOUIS B. WHITNEY,
Solicitors for Plaintiff,
703 Luhrs Tower,
Phoenix, Arizona.
C. W. DURBROW,
HENLEY C. BOOTH,
BURTON MASON,
of Counsel,
65 Market Street,
San Francisco, California.

[Endorsed]: Filed Mar. 2, 1940. [116]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents:

That we, Southern Pacific Company, a corporation duly organized and existing under the laws of the State of Kentucky, as Principal, and Saint Paul Mercury Indemnity Company, a corporation organized and existing under the laws of the State of Delaware and authorized to transact a surety business in the State of Arizona, as Surety, are duly held and firmly bound, jointly and severally, unto Joe Conway, in the full and just sum of Two Hundred Fifty Dollars ($250.00), to be paid to the said Joe Conway, his heirs, executors, administrators, successors and assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Duly executed and sealed with our seals this 2d day of March, 1940.

Whereas, lately, at a trial held before the District Court of the United States in and for the District of Arizona, in a suit pending in said Court between said Southern Pacific Company, a corporation, plaintiff, and Joe Conway, defendant, a judgment was rendered against the said plaintiff dismissing [117] said suit for want of jurisdiction, and said plaintiff intends and proposes to appeal from the said judgment, and has this day duly filed, concurrently with this Bond, a Notice of Appeal from said judgment:

Now, therefore, the condition of the above obligation is such that if the said Southern Pacific Company, a corporation, plaintiff, shall prosecute said appeal to effect and pay all costs if the appeal be dismissed or the judgment affirmed, or such costs as the appellate court may award if the judgment be modified, then the above obligation to be void, otherwise to remain in full force and effect.

SOUTHERN PACIFIC COMPANY,
a corporation,
By ALEXANDER B. BAKER,
Its Attorney.

[Seal] SAINT PAUL MERCURY INDEMNITY COMPANY,
a corporation,
By G. H. MYERS,
Its Attorney-in-Fact.

[Endorsed]: Filed Mar. 2, 1940. [118]

[Title of District Court and Cause.]

STIPULATION FOR REFILING DOCUMENTS

It is hereby stipulated and agreed by and between counsel for plaintiff and defendant above named, that

Whereas the plaintiff did on February 15, 1940, file in the above court and cause the following documents, to-wit:

1. Notice of Appeal.
2. Bond on Appeal.

3. Appellant's Designation of Contents of Record on Appeal.

4. Two copies of Reporter's Transcript of Testimony.

5. Statement of Proceedings Had at Trial of Cause, Including Condensed Statement (in Narrative Form) of Testimony Received at Trial.

6. Statement by Plaintiff and Appellant of Points Upon Which It Intends to Rely on Appeal.

And whereas, defendant did on February 24, 1940, file in said court and cause the following documents:

1. Defendant's Notice of Testimony Required in Question and Answer Form.

2. Appellee's Designation of Additional Portions of Record on Appeal.

And whereas, plaintiff has, on March 2, 1940, in said court and cause filed a new Notice of Appeal, a new Bond on [119] Appeal, and a new Appellant's Designation of Contents of Record on Appeal,

Now, therefore, it is stipulated and agreed that it shall not be necessary for plaintiff and appellant to file or serve a new Statement of Proceedings Had at Trial of Cause, Including Condensed Statement (in Narrative Form) of Testimony Received at Trial, or a new Statement by Plaintiff and Appellant of Points Upon Which it Intends to Rely on Appeal, but the originals of said instruments shall be deemed redated as of March 2, 1940, and may be so redated, and shall be marked by the Clerk of said

Court as being refiled the same date and hour as the said Appellant's Designation of Contents of Record on Appeal filed on March 2, 1940.

It is further stipulated and agreed that it shall not be necessary for defendant and appellee to file or serve a new Defendant's Notice of Testimony Required in Question and Answer Form, or Appellee's Designation of Additional Portions of Record on Appeal, but the originals of said instruments shall be deemed redated as of March 2, 1940, and may be so redated, and shall be marked by the Clerk of said Court as being refiled at an hour after the filing on March 2, 1940, of Appellant's Designation of Contents of Record on Appeal.

The two copies of Reporter's Transcript of Testimony shall by the Clerk be marked as refiled at the same hour and date as Appellant's Designation of Contents of Record on Appeal filed March 2, 1940.

Appellant's Designation of Contents of Record on Appeal originally filed February 15, 1940, may be withdrawn.

Dated: March 2, 1940.

ALEXANDER B. BAKER. [120]
LOUIS B. WHITNEY,
Attorneys for Plaintiff,
703 Luhrs Tower,
Phoenix, Arizona.
CHARLES L. STROUSS,
W. E. POLLEY,
Attorneys for Defendant,
703 Heard Building,
Phoenix, Arizona.

[Endorsed]: Filed Mar. 2, 1940. [121]

[Title of District Court and Cause.]

ORDER FOR REFILING DOCUMENTS PURSUANT TO STIPULATION OF COUNSEL

It is hereby ordered that the Statement of Proceedings Had at Trial of Cause, Including Condensed Statement (in Narrative Form) of Testimony Received at Trial, and the Statement by Plaintiff and Appellant of Points Upon Which It Intends to Rely on Appeal, originally filed in this Court and cause on February 15, 1940, shall by the Clerk of this Court be redated as of March 2, 1940, and shall by the Clerk of this Court be refiled as of the same date and hour as Appellant's Designation of Contents of Record on Appeal filed March 2, 1940, and so marked.

It is further ordered that the Defendant's Notice of Testimony Required in Question and Answer Form and Appellee's Designation of Additional Portions of Record on Appeal, originally filed in this Court and cause on February 24, 1940, shall by the Clerk of this Court be redated as of March 2, 1940, and shall by the Clerk of this Court be refiled as of an hour after the filing on March 2, 1940, of Appellant's Designation of Contents of Record on Appeal, and shall be so marked.

It is further ordered that the two copies of Reporter's [122] Transcript of Testimony shall by the Clerk be marked as refiled the same hour and date as Appellant's Designation of Contents of Record on Appeal filed March 2, 1940.

The original Appellant's Designation of Contents of Record on Appeal filed February 15, 1940, may be withdrawn from the files by the plaintiff.

Dated this 2d day of March, 1940.

DAVE W. LING,

Judge.

[Endorsed]: Filed Mar. 2, 1940. [123]

[Title of District Court and Cause.]

STATEMENT OF PROCEEDINGS HAD AT TRIAL OF CAUSE, INCLUDING CONDENSED STATEMENT (IN NARRATIVE FORM) OF TESTIMONY RECEIVED AT TRIAL.

Now comes the above named plaintiff, Southern Pacific Company, and submits herewith the following statement of the proceedings had at the trial of the above entitled cause, including therein a condensed statement, in narrative form, of the testimony received at said trial:

Be it remembered that the above entitled cause came on regularly for trial before the above entitled Court on the 12th day of December, 1939, Honorable Dave W. Ling, United States District Judge, presiding, and sitting without a jury, a trial by a jury having been duly waived by the parties. Plaintiff was represented by its counsel, Messrs. Alexander B. Baker, Louis B. Whitney, Henley C. Booth

and Burton Mason; defendant appeared in person, and was also represented by his counsel, Messrs. Charles L. Strouss and W. E. Polley. Thereupon, the following proceedings, and none other, were taken and had: [124]

Defendant, through his counsel, presented his written motion that the Court amend, in certain particulars, the Court's order on pre-trial conference theretofore entered under date of December 1st, 1939; a copy of which said motion by defendant is included in the record upon appeal in this cause, and is therefore not repeated here.

Defendant's counsel thereupon presented argument in support of said motion, asserting that the original order dated December 1, 1939, was in part erroneous, and in part based upon an inadvertent admission; and plaintiff, through its counsel then and there objected to defendant's said motion, and argued in opposition thereto, asserting that said original order correctly reflected the record upon the pre-trial conference, insofar as it concerned the amendments particularly requested by the defendant, and that said latter amendments were not supported by said record, and could not be allowed upon the ground or excuse of alleged inadvertence, in that some six weeks had passed since the date of the pre-trial conference and before the motion to amend was presented. The Court then and there overruled plaintiff's said objections and made its order granting defendant's said motion.

Plaintiff thereupon offered in evidence, as its Exhibit No. 1, the affidavit of the defendant, dated May 5, 1939, and filed by him with and in support of his original motion to dismiss the complaint herein. Said affidavit was duly received in evidence without objection. A copy thereof is included in the record upon this appeal, and is therefore not repeated here.

Plaintiff thereupon offered in evidence, as Plaintiff's Exhibit No. 2, the notice of taking of the deposition of said defendant; which notice of taking deposition was duly [125] received in evidence without objection. Said notice

PLAINTIFF'S EXHIBIT NO. 2

was and is in words and figures, as follows: (Title of Court and Cause omitted)

"Notice of Taking Deposition.

To: Joe Conway, defendant above named, and Charles L. Strouss, Esq., and W. E. Polley, Esq., his attorneys:

You and each of you please take notice, that the above named plaintiff, Southern Pacific Company, a corporation, by and through its attorneys, Alexander B. Baker, Louis B. Whitney, C. W. Durbrow, Henley C. Booth and Burton Mason, shall, on Wednesday, the 11th day of October, 1939, at the hour of 10:00 o'clock, A. M. of said day, at the office of Baker & Whitney, 703 Luhrs Tower, Phoenix, Maricopa County, Arizona, before Louis L. Billar, a No-

tary Public in and for said county and state, and duly authorized to take depositions and administer oaths within said county and state, take the deposition of said defendant, Joe Conway, whose address is Phoenix, Arizona, as an adverse party, on oral examination.

This deposition shall be taken as the deposition of an adverse party, pursuant to and subject to the provisions of the Rules of Civil Procedure for the District Courts of the United States applicable thereto.

Dated at Phoenix, Arizona, this 29th day of September, 1939.

ALEXANDER B. BAKER,
LOUIS B. WHITNEY,
Solicitors for Plaintiff,
703 Luhrs Tower,
Phoenix, Arizona.
C. W. DURBROW,
HENLEY C. BOOTH,
BURTON MASON,
Of Counsel,
65 Market Street,
San Francisco, California.

Service, by receipt of copy of the foregoing Notice of Taking Deposition, acknowledged this 29th day of September, 1939.

CHARLES L. STROUSS,
W. E. POLLEY,
Attorneys for Defendant."

It was then and there stipulated by and between counsel for the parties that the defendant's deposition had been duly taken pursuant to the aforesaid Notice. [126]

Thereupon, plaintiff offered in evidence, and there was received, as

PLAINTIFF'S EXHIBIT NO. 3,

the deposition of defendant, Joe Conway, taken as an adverse party by the plaintiff, pursuant to the provisions of the Federal Rules of Civil Procedure. The testimony of said

JOE CONWAY,

who was called as an adverse party, and was duly sworn prior to the taking of said deposition, as the same appears in said deposition, is here reproduced for the purposes of the record upon this appeal, in condensed narrative form, as follows:

(In response to questions by Mr. Mason):

I am the defendant in the case of Southern Pacific Company versus Conway. I am Attorney General of Arizona, having held that office now for three years. I was first elected in the fall of 1936 and re-elected in 1938. My present term expires about January 1st, 1941. I am a law school graduate and was admitted to the Bar of Arizona in 1924.

I don't know whether there is any legal principle to the effect that where a state undertakes regulation pursuant to its police power, that regulation is presumed to be valid until other-

(Deposition of Joe Conway.)

wise determined by a competent court. I have never heard that such a principle was advocated on behalf of the Attorney General of Arizona in the first Arizona Train Limit case. I refuse to answer whether I have ever said that the Attorney General is charged with the duty of upholding the state laws regardless of their nature. I have read the Arizona Train Limit Law, Section 647 of the Arizona Revised Code, 1928, which has been repeated to me, and I know [127] that that statute contains a specific reference to the Attorney General. I do not know whether there are any other Arizona statutes which impose upon the Attorney General a similar duty of enforcement.

I am represented by counsel in this proceeding and I have said in my answer herein that I have no official funds with which to defend the case. I refuse to answer whether I personally selected Mr. Strouss as my counsel or whether his compensation as my attorney is being paid out of official or personal funds of my own. I also refuse to answer whether Mr. Strouss was selected and furnished to me as counsel without expense to me or to say who selected and employed him for me as my counsel. I further refuse to answer whether Mr. Strouss is being paid for his work in this case by the railway brotherhood organizations in Arizona.

(Deposition of Joe Conway.)

I am following the advice of Mr. Strouss and Mr. Polley very closely in this case and I know that Mr. Strouss was at one time assistant attorney general of Arizona. I have heard that he participated actively in the trial and briefing of the first Arizona Train Limit case.

I do not intend and never have intended to make any differentiation in my enforcement of the laws, as between large and small, rich and poor, or to adopt any prejudice or favoritism in enforcing the laws, as written. I don't recall ever having mentioned in any public statement whether I would or would not enforce any laws on the statute books of Arizona. I have never said that there was any statute that I would not enforce but I have never said that I would enforce an unconstitutional law. I have twice taken the [128] oath of office as Attorney General, declaring in the terms of the oath, as it appears in the Arizona statutes that I will support the Constitution of the United States and the Constitution and Laws of Arizona, and faithfully and impartially discharge the duties of the office of Attorney General according to the best of my ability. That oath calls upon me to carry out the Attorney General's duties; and if the Train Limit Law is constitutional I have no doubt that I must enforce it in the event of violation; but so far there never has been any violation since I have been Attorney General.

(Deposition of Joe Conway.)

I don't recall that I have ever made a statement one way or another on the proposition that, having regard for my oath of office, there was any duty written into a state statute, such as the duty of prosecution for violations, which I would fail to perform. I don't recall that I have ever commented upon the question whether, having regard for my oath of office, there was any state statute which I would refrain from enforcing or refuse to enforce. [129]

* * * * * * *

Q. Now, Mr. Conway, on the day that this suit was filed, which was April 18th, 1939, you went to Governor Jones and asked him for a special appropriation in order to carry on the defense of this case, did you not?

A. No, I didn't ask him for an appropriation.

Q. Isn't it a fact that you told Governor Jones that a special appropriation would be necessary for the Attorney General's office for the purpose of the defense?

A. No, I didn't tell the Governor in so many words that.

Q. And didn't you suggest to the Governor, that in a special session which was then contemplated—that in calling a special session which was then contemplated, the matter of such appropriation should be included in the call?

(Deposition of Joe Conway.)

A. That was—that was more the mission I saw the Governor on. I heard rumors that there might possibly be a special session, and I talked to the Governor about the matter and suggested to him that he include in the call a special appropriation for the Attorney General's office to take care of any of these contingencies which might arise, including this suit which was then filed, [145] or any other matters that might come up.

Q. You particularly mentioned this suit as one for which the money might be required, did you not? A. I believe I did, yes.

Q. And you intended, if the money were appropriated, to use that money to defend the suit, did you not?

A. Well, that was the purpose of asking for it. It was not a question of what might have been done with the money afterwards, but that was the purpose of asking that it be included in the call.

Q. Your purpose then, of course, was to defend the suit on the merits, was it not?

* * * * * * *

The Witness: No, at that time I had not gone into the question of whether or not the Attorney General was involved as the Attorney General, or whether Joe Conway, as a private citizen, was involved. That question I had not worked out in my own mind, but I was not going to take any chances, and as long as there

(Deposition of Joe Conway.)

was a possibility of a special session, like all Attorney Generals, we always like to get a little more money in the coffers so we can hire some additional help.

Mr. Mason: If you did not intend to defend the suit on the merits, Mr. Conway, why was it necessary to make a request or the suggestion at all?

* * * * * * *

The Witness: I didn't know what we might be up against. I first consulted with Mr. Strouss about the defense of [146] the case some time after the complaint was first served upon me.

I have heard of the Nevada Train Limit Case and it is true that I requested the Attorney General of Nevada to send me his records and files in that case. I wanted to obtain the benefit of his experience and the work that he had done. I have never read the Special Master's report or the decision of the three-Judge court in Nevada. In my campaign for re-election in 1938 I did not particularly seek the support of the railway brotherhood members, though their support was welcome to me, just as any support is welcome to any politician. I recognize that there are several thousand votes in the railroad brotherhood group and that they are a very potent factor in certain aspects of certain Arizona elections. I do not recall that in the 1938 campaign, I ever promised or suggested to the railway brotherhood representatives that I

(Deposition of Joe Conway.)

would never threaten to enforce the Train Limit Law. I did not make any such advance or proposition to the brotherhood or any of their delegates, or ask for their support at the convention. I don't recall that I went to that extreme. I know a large number of railroad men and I have talked to them individually and tried to get their support.

I have followed Mr. Strouss' advice in this case pretty closely because I feel that he is competent and capable and I have always held him in high respect. His prior experience in the first Arizona Train Limit case should certainly be an asset in this case. It is a fact that on May 22nd of this year, in the court room, I told [130] the Court and those present that Mr. Strouss, since you have forced me to hire an attorney and I have an attorney hired, would do the talking for me.

I have never discussed with Mr. Strouss the question of whether the Arizona Train Limit Law is constitutional or not because of the fact that there are a number of factors which might enter into the question. There have been many changes since the former suit and since the Nevada case. There are many factors that any attorney is going to take into consideration when he attempts to determine what a possible decision in the Supreme Court or some other court might be. It is probably true that Mr. Strouss has strongly maintained that the Arizona law

(Deposition of Joe Conway.)

is valid and binding upon the plaintiff, as a railroad company in Arizona, in the same manner as any attorney would do when he was on one side of the case, but Mr. Strouss has never expressed his personal opinion to me and I do not know what it is. [131]

* * * * * * *

Q. You recognize, of course, that the full crew law is a law protecting railroad labor, or at least for its benefit?

A. Well, it might be partly on labor and it might be partly on safety. I have always taken more or less the view that the bill was drawn not so much to assist in the labor, but to protect the lives and limbs of those who work in the transportation game.

Q. And would you say the same on the Train Limit Law as you would on the full crew law? A. I would say that, yes.

Q. That it is a law for the protection of the employees?

A. For the protection of their lives and limbs.

Q. Then it is a law protecting railroad labor, isn't it, not in the sense of re-employment of labor, but protecting the employees of the railroad against hazards incident to their employment?

A. It may be. I don't know the purpose of the law. I was not in the Legislature when the bill was passed. Of course, I understand the

(Deposition of Joe Conway.)

contention of the railroad companies is that it is purely a labor increasing bill and the railroad boys, I understand, claim it is a safety device or safety measure.

Q. You have heard or seen some of their arguments to the effect it permits individual safety to the railroad men?

A. I have heard several comments on it.

Q. And you have also heard several of their [147] arguments to the effect that it protects the employment and the men who need employment?

A. I think the railroad boys are very careful not to let that argument get in.

Q. Perhaps, Mr. Conway, you should familiarize yourself with some of the arguments made to the Legislature including Congress, on the advocacy of——

* * * * * * *

Mr. Mason: You recognize from that standpoint; that is, from the standpoint of safety and perhaps the standpoint of continued employment, that it is in the interest of the brotherhoods that the Train Limit Law should remain in effect, don't you?

* * * * * * *

The Witness: Oh, I understand that they are in favor of upholding the law, but most of the arguments I have heard from men in the railroad game is that it is for their personal protection, for their safety.

(Deposition of Joe Conway.)

Mr. Mason: You also recognize, do you not, that they have an interest in having the Train Limit Law remain unchallenged in the courts?

A. Well, I imagine they would have. If I were in the game I would have an interest in it.

Q. And you also recognize their interest in having the law respected and observed and obeyed, do you not?

* * * * * * *

The Witness: What do you mean, "I recognize"?

Mr. Mason: You have said that you viewed the law, that you knew their view to be that the law was one for their protection as individuals? [148]

A. Oh, I didn't say that I know their views; that is, taking the brotherhood as a whole. I have talked to several railroad men about it, discussed the matter pro and con.

Q. You recognize their interest in having the law obeyed and having a train kept at the maximum of seventy cars or fourteen cars, as the case may be?

* * * * * * *

The Witness: I understand they fought here to put the law through and, of course, they put it through and they would like to have it kept on the books if they can.

Mr. Mason: And they would like to have it obeyed as long as it was kept on the books?

* * * * * * *

(Deposition of Joe Conway.)

The Witness: I imagine they would. [149] I have also heard of attempts by the brotherhood to have a national Train Limit Law passed by Congress.

I have no fear that if an actual court test on the Train Limit Law were had on the merits, the law might be set aside as invalid. I have no fear about any law. Those are matters for the courts to decide, not me. If a law is set aside, that is up to the courts. I do not anticipate one way or the other what the decision of a court would be if this law were challenged in court on the merits. At the time this suit was filed I gave an off-hand opinion that I didn't think the law was worth anything, but that was not an official opinion and I had not gone into the merits from the standpoint of safety; I had not read the record in the Nevada case and therefore I wouldn't know what the courts would say. Since the earlier Arizona case, and particularly since I have been Attorney General, no violation of the Train Limit Law has been called to my attention; and I don't intend to pay any attention to that law until something takes [132] place, for the reason that I have not formed or expressed an opinion at any time as to whether the law is valid or not, except the opinion I expressed, and just referred to when I said that personally I thought the law was worthless.

(Deposition of Joe Conway.)

Mr. Mason: You never made any public announcement that you would refrain from the enforcement of it or any private announcement?

A. I never have, and what is more, I never will, but until there is a violation of the law I don't think it is the duty of the Attorney General to go through the statute books and, as you say, there are fifty-two, or fifty some odd different sections in there that the Attorney General should prosecute or should attempt to uphold the laws, but until the occasion arises, we have plenty of other work without looking for it.

Q. Of course, you agree that if the law is violated, why, it will then be and it is right now your official duty to prosecute every violation?

A. Prosecution if it is violated and if it is in violation, but there has never been any violation in the State of Arizona called to my attention and there is still doubt in my mind whether the law is constitutional or unconstitutional, and before I ever take any steps to do anything, I certainly would spend some time to go into the law and determine whether it is or not.

I am not trying to forestall an actual test of the law by court proceedings, through my assertion of ignorance or indifference as to the validity of the law; but I am not looking for

(Deposition of Joe Conway.)

trouble until trouble hits me and until this suit was filed there was no occasion for me to take any action. Although this suit has been on file one week short of five months I have not looked into the law, read the records or reviewed the decisions of the Supreme Court, and other courts. [133]

Q. You told the people in this State in 1938, did you not, in a campaign leaflet, that you had done your work promptly and diligently, fought all comers and would be ready for action in every court in the nation, is that true?

* * * * * * *

The Witness: If it so states in the pamphlet.

Mr. Mason: And then you pledged to the people of Arizona in a letter sent out while you were a candidate for re-election or nomination for re-election, "I pledge to continue giving you and the State a sound and trustworthy administration".

* * * * * * *

The Witness: If it appears in our publicity, we sent it out.

Mr. Mason: You know, do you not, that a statement of that kind went out over your signature with your photograph on the literature?

A. Something to that effect. [150]

* * * * * * *

Mr. Mason: When you said in this campaign statement of 1938 that you pledged to

(Deposition of Joe Conway.)

continue giving you, meaning the voter, and the State, a sound and trustworthy administration, did you mean that you would refrain from enforcing any law of the State or violation thereof called to your attention.

A. I meant just exactly what I said.

Q. Did you perhaps mean that if a violation were called to your attention, you would proceed to prosecute the violator?

* * * * * * *

The Witness: My whole attitude has been that anything pertaining to the laws of the State of Arizona that was constitutional in my opinion and would need attention, to give it attention and we would give it to them just as fast as we could possibly do it, and I think our record shows that we have done it. [151]

Thereupon, upon request of plaintiff, through its counsel, the Court made its order incorporating the transcript of the proceedings at the pre-trial conference into the record of the trial of this cause. Said transcript of proceedings upon pre-trial conference is set forth elsewhere in full in the record upon this appeal and is therefore not repeated here.

Thereupon plaintiff rested its case. Defendant thereupon also rested his case, except that through his counsel he then and there orally renewed his motion to dismiss the complaint, basing said motion upon the following grounds:

(1) Want of jurisdiction because of no evidence that a case or controversy exists, and

(2) The action is against the State of Arizona, and therefore barred by the Eleventh Amendment to the Federal Constitution.

Defendant's counsel thereupon argued orally to the court in support of said motion to dismiss; and plaintiff's [134] counsel argued orally in reply; and the cause was thereupon submitted to the court for its decision.

Dated this 15th day of February, 1940.

Redated this 2nd day of March, 1940. H. S.

ALEXANDER B. BAKER
LOUIS B. WHITNEY
Solicitors for Plaintiff
703 Luhrs Tower
Phoenix, Arizona
C. W. DURBROW
HENLEY C. BOOTH
BURTON MASON
Of Counsel
65 Market Street,
San Francisco, California.

Copy of the within received this 15th day of February, 1940.

CHARLES L. STROUSS
W. E. POLLEY
Attorneys for defendant.

[Endorsed]: Filed Feb 15 1940.

[Endorsed]: Redated & Refiled (by order of Court 3/2/40) as of 11.20 a. m. Mar. 2, 1940. [135]

[Title of District Court and Cause.]

STATEMENT BY PLAINTIFF AND APPELLANT OF POINTS UPON WHICH IT INTENDS TO RELY ON APPEAL.

The above named plaintiff and appellant, Southern Pacific Company, a corporation, hereby states that upon its appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore rendered and entered in the above entitled cause, said plaintiff and appellant intends to rely upon the following points:

(1) The trial court erred in granting defendant's motion to amend said trial court's order of December 1, 1939, entered pursuant to pre-trial conference; and in amending its order last mentioned in accordance with defendant's said motion.

(2) The trial court erred in failing to find and conclude, upon the pleadings, the undisputed evidence, and the defendant's admissions, that (1) said defendant admits and agrees that it now is and in future will be his official duty to prosecute for each and every violation of the Arizona Train Limit Law (Revised Code of Arizona, 1928, Section 647) which may occur, and that (2) said defendant has further declared that he never [136] has stated, and never will state, having in mind his official oath of office as Attorney General, that he will refuse to enforce said Train Limit Law, or will refrain from efforts to enforce it.

(3) The trial court erred in failing to find and conclude that, irrespective of defendant's individual beliefs or admissions, as to the unconstitutionality of the said Train Limit Law, it is his official duty as Attorney General to enforce said law according to its terms, until and unless the invalidity of said law be finally determined by a competent tribunal, and that said defendant has never disavowed such duty, or declared that he would refuse to perform or refrain from performing the same.

(4) The trial court erred in finding and concluding that said defendant has not threatened to enforce said Train Limit Law; and erred further in finding and concluding that said defendant has taken no action toward enforcing said Train Limit Law.

(5) The trial court erred in failing to find and conclude that this action for a declaratory judgment is properly and lawfully maintainable against the defendant.

(6) The trial court erred in concluding that no case or controversy, within the judicial power of the United States Courts, is here presented; and in failing to find and conclude that the pleadings, the undisputed evidence, and the admissions of defendant, fully and adequately show that an actual controversy exists in this cause, as between said plaintiff and defendant, of which said trial court had and has lawful jurisdiction.

(7) The trial court erred in making and entering its order of February 9, 1940, directing that this case be dismissed, and in rendering and entering its judgment dated February 14, [137] 1940, in favor of defendant, pursuant to its said order.

(8) The trial court erred in failing to adjudge and decree that no power or duty to enforce said Train Limit Law, or to commence, or conduct, or direct, prosecutions thereunder, in the event of violation, is lawfully vested in or imposed upon defendant, either as Attorney General of Arizona, or otherwise, and in failing to render and enter its declaratory judgment and decree in favor of the plaintiff accordingly.

Dated: February 15, 1940.

Redated: March 2, 1940. H. S.

ALEXANDER B. BAKER
LOUIS B. WHITNEY
Solicitors for Plaintiff
703 Luhrs Tower,
Phoenix, Arizona.

C. W. DURBROW
HENLEY C. BOOTH
BURTON MASON
Of Counsel
65 Market Street
San Francisco, California.

Receipt of the within and foregoing acknowledged this 15th day of February, 1940.

CHARLES L. STROUSS
W. E. POLLEY
Attorneys for Defendant.

[Endorsed]: Filed Feb. 15, 1940.

[Endorsed]: Redated and Refiled (by order of Court 3/2/40) as of 11:20 a. m. Mar. 2, 1940. [138]

[Title of District Court and Cause.]

REQUEST FOR ABBREVIATION OF RECORD.

To: Edward S. Scruggs, Clerk of the District Court of the United States for the District of Arizona:

Counsel for defendant have, in the above court and cause, filed "Defendant's Notice of Testimony Required in Question and Answer Form". Included in the portions of the testimony required in question and answer form are certain objections and remarks of counsel, hereinafter set forth, which are not essential to the decision of the questions presented by the appeal, and may be omitted from the record. You are requested to omit from the record on appeal being prepared by you the following parts or portions of the testimony in question and answer form, as shown by the Reporter's Transcript of Testimony on file herein, to-wit:

Lines 15 and 16, page 39 of the Reporter's Transcript, reading as follows:

"Mr. Strouss: I object to the form of that question."

Line 5, page 40, Reporter's Transcript, reading as follows:

"Mr. Strouss: I think he has answered that." [142]

Lines 12 and 13, page 57, Reporter's Transcript, reading as follows:

"Mr. Strouss: I think he has told you that he has not examined into or investigated this."

Line 19, page 57, Reporter's Transcript, reading as follows:

"Mr. Strouss: I object to that as immaterial."

Line 7, page 58, Reporter's Transcript, reading as follows:

"Mr. Strouss: I object to that as immaterial."

Line 20, page 58, Reporter's Transcript, reading as follows:

"Mr. Strouss: I object to that as immaterial."

Line 1, page 59, Reporter's Transcript, reading as follows:

"Mr. Strouss: I object to that."

Line 25, page 66, Reporter's Transcript, reading as follows:

"Mr. Strouss: I object to that as immaterial."

Line 6, page 67, Reporter's Transcript, reading as follows:

"Mr. Strouss: I object to that as immaterial."

Line 13, page 67, Reporter's Transcript, reading as follows:

"Mr. Strouss: I object to that as immaterial."

Lines 25 and 26, page 67, and Line 1, page 68, Reporter's Transcript, reading as follows:

"Mr. Strouss: I object to that as immaterial. Make it more definite as to what law the question refers to, and——" [143]

Dated this 5th day of March, 1940.

CHARLES L. STROUSS
W. E. POLLEY
Attorneys for Defendant
703 Heard Building
Phoenix, Arizona
ALEXANDER B. BAKER
LOUIS B. WHITNEY
Attorneys for Plaintiff
703 Luhrs Tower
Phoenix, Arizona.

[Endorsed]: Filed Mar. 5, 1940. [144]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

Now Comes, Southern Pacific Company, a corporation, plaintiff in the above entitled and numbered cause, and pursuant to and in compliance with the provisions of Rule 75 of the Federal Rules of Civil Procedure, hereby designates the following portions of the record, proceedings and evidence to be contained in the record on appeal by said plaintiff to the United States Circuit Court of Appeals in and for the Ninth Circuit, from the judgment heretofore rendered in said cause, namely:

(1) The Complaint.

(2) The defendant's motion to dismiss said complaint.

(3) Defendant's affidavit in support of said motion to dismiss.

(4) Plaintiff's motion to strike defendant's said affidavit in support of said motion to dismiss.

(5) The order of the District Court denying defendant's said motion to dismiss and also denying plaintiff's motion to strike said affidavit.

(6) The defendant's answer to the complaint.

(7) The transcript of the proceedings upon pre-trial conference held November 3, 1939. [152]

(8) The original order of the Court on pre-trial conference, dated and entered December 1, 1939.

(9) Defendant's motion to amend the original order of December 1, 1939 on pre-trial conference

(which motion was presented to the Court on December 12, 1939).

(10) The order of the Court granting defendant's said motion to amend the order on pre-trial conference.

(11) The statement of the proceedings had at the trial of said cause, on December 12, 1939 (omitting the arguments of counsel), including the testimony then and there received, as the same is set forth in the condensed statement of said testimony, in narrative form, which statement is filed herewith and hereby referred to.

(12) The findings of fact and conclusions of law proposed and requested by defendant.

(13) Plaintiff's proposed amendments and additions to "draft of findings of fact and conclusions of law" presented by defendant.

(14) The findings of fact and conclusions of law made and adopted by the Court.

(15) The trial court's order of February 9, 1940, directing that the case be dismissed.

(16) The judgment rendered and entered by the trial court under date of February 14, 1940.

(17) The notice of appeal filed February 15, 1940.

(18) The bond on appeal, filed February 15, 1940.

(19) The notice of appeal filed March 2, 1940.

(20) The bond on appeal filed March 2, 1940.

(21) The statement of plaintiff and appellant of the points upon which it intends to rely on its appeal.

(22) This designation of matters to be contained in the record on appeal. [153]

(23) Each and every minute order rendered and entered by the trial court, other than those heretofore particularly specified.

(24) Stipulation for refiling documents.

(25) Order for refiling documents.

Dated: this 2nd day of March, 1940.

ALEXANDER B. BAKER
LOUIS B. WHITNEY
Solicitors for Plaintiff
703 Luhrs Tower
Phoenix, Arizona
C. W. DURBROW
HENLEY C. BOOTH
BURTON MASON
Of Counsel
65 Market Street
San Francisco, California.

Receipt of copy of the within and foregoing acknowledged this 2nd day of March, 1940.

CHARLES L. STROUSS,
Attorney for Defendant.

[Endorsed]: Filed Mar. 2, 1940. [154]

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PORTIONS OF RECORD ON APPEAL.

Now comes Joe Conway, defendant in the above entitled and numbered cause, and pursuant to and in compliance with Rule 75 of the Federal Rules of Civil Procedure hereby designates the following portions of the record, proceedings and evidence, in addition to those portions heretofore designated by the plaintiff, to be contained in the record on appeal by the plaintiff to the United States Circuit Court of Appeals in and for the Ninth Circuit, from the judgment heretofore rendered in said cause, to-wit:

(a) Defendant's Motion to Amend Findings of Fact and Conclusions of Law.

(b) Order of Court on Defendant's Motion to Amend Findings of Fact and Conclusions of Law.

(c) Defendant's Notice of Testimony required in Question and Answer form.

(d) This Designation of Additional Portions of Record on Appeal.

Dated this 23rd day of February, 1940.

Redated this 2nd day of March, 1940. H. S.

CHARLES L. STROUSS
W. E. POLLEY
Attorneys for Defendant
703 Heard Building
Phoenix, Arizona. [155]

[Endorsed]: Filed Feb. 24, 1940.

[Endorsed]: Redated & Refiled (by Order of Court 3/2/40) as of 11:45 a. m. Mar. 2, 1940. [156]

[Title of District Court.]

United States of America
District of Arizona—ss:

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Southern Pacific Company, (a corporation), Plaintiff, versus Joe Conway, Defendant, numbered Civ-31 Phoenix, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 156, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in Appellant's Designation of Contents of Record on Appeal, and Appellee's Designation of Additional Portions of Record on Appeal, filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of $23.90, and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court at Phoenix, Arizona, this 14th day of March, 1940.

[Seal] EDWARD W. SCRUGGS,
Clerk

By WM. H. LOVELESS
Chief Deputy Clerk. [157]

[Endorsed]: No. 9474. United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, a corporation, Appellant, vs. Joe Conway, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed March 16, 1940.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 9474

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellant,

vs.

JOE CONWAY,

Appellee.

STATEMENT BY APPELLANT OF POINTS UPON WHICH IT INTENDS TO RELY UPON APPEAL, WITH DESIGNATION OF PARTS OF RECORD DEEMED NECESSARY FOR PRINTING.

Now comes Southern Pacific Company, a corporation, the above-named appellant, and, in accordance with subdivision 6 of rule 19 of the rules of this Court, hereby states that upon its appeal it intends to rely upon the points specified in the document heretofore filed by said appellant, in the District Court of the United States for the District of Arizona, on March 2, 1940, designated "Statement by Plaintiff and Appellant of Points upon which it Intends to Rely on Appeal", and that it adopts the statement of points appearing in the document last mentioned as the statement of the points upon which it intends to rely upon this appeal.

Pursuant to the aforesaid rule, said appellant hereby designates for printing the entire transcript

of record in this cause heretofore certified by the Clerk of the above-entitled District Court and transmitted by said Clerk to the Clerk of this Court.

Dated: March 19, 1940.

C. W. DURBROW
H. C. BOOTH
BURTON MASON
65 Market Street
San Francisco, California
ALEXANDER B. BAKER
LOUIS B. WHITNEY
703 Luhrs Tower
Phoenix, Arizona
Attorneys for Appellant.

[Endorsed]: Filed Mar. 21, 1940. Paul P. O'Brien, Clerk.